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HUMAN RIGHTS COMMITTEE

## CONSIDERATION OF REPORTS SUBMITTED BY STATES PARTIES UNDER ARTICLE 40 OF THE COVENANT

### Third periodic reports of States parties due in 1991

### Addendum

### AUSTRALIA*

[28 August 1998]

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* For the second periodic report submitted by the Government of Australia, see document CCPR/C/42/Add.2; for its consideration by the Committee, see CCPR/C/SR.806-809 and Official Records of the General Assembly, Forty-third Session, Supplement No. 40 (A/43/40), paras. 413-460.

# CONTENTS

| | Paragraphs | Page |
|---|---|---|
| INTRODUCTION | 1 - 10 | 3 |
| THE OPTIONAL PROTOCOL | 11 - 14 | 4 |
| Article 1 | 15 - 39 | 5 |
| Article 2 | 40 - 79 | 9 |
| Article 3 | 80 - 226 | 17 |
| Article 4 | 227 - 274 | 40 |
| Article 5 | 275 - 276 | 48 |
| Article 6 | 277 - 355 | 48 |
| Article 7 | 356 - 385 | 64 |
| Article 8 | 386 - 404 | 70 |
| Article 9 | 405 - 621 | 73 |
| Article 10 | 622 - 661 | 114 |
| Article 11 | 662 | 122 |
| Article 12 | 663 - 693 | 122 |
| Article 13 | 694 - 718 | 128 |
| Article 14 | 719 - 828 | 132 |
| Article 15 | 829 - 863 | 153 |
| Article 16 | 864 - 865 | 160 |
| Article 17 | 866 - 944 | 161 |
| Article 18 | 945 - 974 | 174 |
| Article 19 | 975 - 1044 | 180 |
| Article 20 | 1045 - 1060 | 194 |
| Article 21 | 1061 - 1080 | 197 |
| Article 22 | 1081 - 1136 | 201 |
| Article 23 | 1137 - 1192 | 210 |
| Article 24 | 1193 - 1229 | 219 |
| Article 25 | 1230 - 1286 | 226 |
| Article 26 | 1287 - 1349 | 239 |
| Article 27 | 1350 - 1509 | 254 |
| List of tables | | 287 |

## Introduction

1. This is the Australian Government's third report to the Human Rights Committee submitted in accordance with the requirements of article 40 of the International Covenant on Civil and Political Rights.

2. Australia's first report was submitted in 1981 and considered by the Human Rights Committee in 1982. Australia's second report was submitted in 1987 and considered by the Committee in 1988. The present report covers the period from March 1987 to December 1995. It has taken into account the comments of the Human Rights Committee on Australia's second report.

3. Australia has a federal constitutional system in which executive, legislative and judicial powers are shared or distributed between the Federal Government, six state and two territory governments. The report therefore is the product of a cooperative effort by the governments of these nine jurisdictions.

4. Given the considerable development in Australian human rights protection over the reporting period, the Australian Government has chosen to present this report as a comprehensive account of the legislation and administration relevant to each article of the Covenant. It provides the context to legislative or administrative regimes wherever possible by reference to statistical trends, community attitudes and the development of practice. To avoid duplication, the detail of each State or Territory law or practice is not described in relation to every issue. It is described in the case where State or Territory law or practice differs significantly from that of another jurisdiction or where further analysis has been warranted.

5. The Australian Government provided some funding to the Human Rights Council of Australia to coordinate and compile comments from human rights non-governmental organizations on an earlier draft of this report. Issues raised by the non-governmental organizations were taken into account in preparing this report.

6. This report will be tabled in Federal Parliament and copies will be sent to federal agencies, state and territory governments and to non-governmental organizations. The summary record of the report's examination and the Committee's concluding observations will also be tabled in the Federal Parliament and provided to federal agencies, state and territory governments and to non-governmental organizations.

7. In this report, the term "states" includes a reference to the Australian Capital Territory and the Northern Territory. (The position of the Australian external territories is discussed under article 1, Australian territories, below.) A reference to the Commonwealth is a reference to the Federal Government of Australia.

8. The period under review saw a number of significant developments in the way in which Australia gives effect to the rights recognized in the International Covenant on Civil and Political Rights. These developments concerned:

> Rights of indigenous peoples - see the commentary under articles 9 and 27;
>
> Rights of children - see the commentary under articles 23 and 24;
>
> The enactment of the Disability Discrimination Act 1992 - see the commentary under article 2;
>
> The enactment of the Racial Hatred Act 1995 - see the commentary under articles 20 and 26; and
>
> The enactment of the Privacy Act 1988 - see the commentary under article 17.

9. On 25 September 1991, Australia acceded to the Optional Protocol to the International Covenant on Civil and Political Rights. On 28 January 1993, Australia made declarations under article 14 of the International Convention on the Elimination of All Forms of Racial Discrimination and article 22 of the Convention against Torture and Other Cruel, Inhuman or Degrading Treatment or Punishment. This means that individual Australians can now make complaints of alleged violations of their rights to international human rights treaty bodies, namely the Human Rights Committee, the Committee on the Elimination of Racial Discrimination and the Committee against Torture.

10. In July 1995, Cooperative Arrangements Regarding International Human Rights Communications and Reports were adopted by the federal and state governments. The Cooperative Arrangements are designed to facilitate consultation between the Federal Government and the governments of the states and territories in relation to Australia's responses to individual complaints that raise issues under state or territory law or practice and to facilitate cooperation in the preparation of reports under the human rights treaties.

## The Optional Protocol

11. During the reporting period, Australia has been formally advised of 11 communications under the Optional Protocol. Three of these communications (Nos. 490/1992, 491/1992 and 499/1992) were declared inadmissible by the Committee without referral to the Australian Government. One (No. 536/1993) was declared inadmissible after referral to the Australian Government. Another communication was decided on its merits (No. 488/1992).

### Communication 488/1992 N. Toonen v. Australia

12. Sections 122 (a) and (c) and 123 of the 1924 Criminal Code of Tasmania made homosexual sexual activity a criminal offence in Tasmania. The author of communication 488/1992 alleged that these provisions were discriminatory under the terms of articles 2.1, 17 and 26 of the Covenant.

13. The Human Rights Committee declared the communication admissible on 5 November 1992 and published its final views on 31 March 1994. It found that sections 122 (a) and (c) and 123 of the Tasmanian code were an arbitrary interference with privacy and placed Australia in breach of article 17.

14. In response to the Committee's views, the Federal Attorney-General held discussions with the Tasmanian Premier and Attorney-General. The Tasmanian Government's position was that no action would be taken in response to the Committee's findings. Accordingly, the Federal Government introduced legislation to provide protection for all Australians from arbitrary interferences with sexual privacy. The legislation, entitled the Human Rights (Sexual Conduct) Act, came into force on 19 December 1994. For further details on the Act, the Committee is referred to the commentary on article 17 below.

## Article 1

### Australia

15. The history of the Australian federation is fully described in the section of the Core Document entitled "General political structure". In summary, the two principal landmarks in achieving self-government in Australia were:

> The institution of responsible government for the six states, pursuant to the Imperial Australian Colonies Government Act 1850 (the colonies adopted new constitutions between 1855 and 1889); and
>
> The later federation of the six states in the Australian Commonwealth on 1 January 1901 through the enactment of the Imperial Commonwealth of Australia Constitution Act 1900.

16. Under the Constitution, which is embodied in the 1900 Imperial Act, the Governor-General of Australia, as the representative of the Crown, is able to exercise all the powers of the Crown in Australia. In practical and institutional terms, Australian self-government involves freely elected parliaments, responsible executive government, an independent judiciary and the rule of law.

### Australian territories

#### Northern Territory

17. Under the Northern Territory (Self-Government) Act 1978 and associated legislation, the Northern Territory has separate political, representative and administrative institutions and its own system of courts. The Northern Territory's legislative assembly has power to make laws for the peace, order and good government of the territory.

## Australian Capital Territory

18. Similarly to the situation in the Northern Territory, the Australian Capital Territory (Self Government) Act 1988 established the Australian Capital Territory as a separate body politic, with its own legislative assembly and executive.

19. The Australian Capital Territory Supreme Court and Magistrates Court have been transferred to the Australian Capital Territory government system from the federal system.

## Papua New Guinea

20. Australia's former Territory of Papua and Trust Territory of New Guinea which had been jointly administered as the Territory of Papua and New Guinea achieved self-government in 1973 and became independent of Australia in 1975.

## Cocos (Keeling) Islands

21. Australia completed its obligations under article 73 (e) of the United Nations Charter in relation to the Territory of Cocos (Keeling) Islands in 1984. On 6 April 1984 an act of self-determination was held in the presence of a United Nations visiting mission. The mission observed a voting process in which the Cocos Malay people chose between independence, free association and integration as provided for in United Nations General Assembly resolution 1541 (XV) of 1960. The mission unanimously concluded that the people of Cocos had exercised their right to self-determination in accordance with the Charter of the United Nations and the Declaration on the Granting of Independence to Colonial Countries and Peoples.

22. A Memorandum of Understanding (MOU) between the Cocos Malay community and the Federal Government was signed in March 1991. The MOU continues the process of integration commenced in 1984. In accordance with the MOU, the Federal Government subsequently enacted the Territories Law Reform Act 1992. Pursuant to this Act, the old Singapore-based legal regime was replaced from 1 July 1992 with a contemporary body of law. The new regime is based on federal laws and the laws of Western Australia (the state geographically closest to the territory and with which it has the closest connections).

23. Political responsibility for the laws of the Cocos (Keeling) Islands remains with the Federal Government. In order that residents of the Islands not be disadvantaged by their geographical isolation, the Federal Government is entering into service delivery arrangements with the Western Australian government for the provision of state-type services.

24. At a practical level, the Federal Government has implemented a range of capital works and improvements in services to raise facilities to comparable mainland standards. This has included upgrading of the Home Island power supply, extensions to the Home Island school, new nurses' quarters and construction of a new health centre. In 1992, the Home Island Development Program (worth $10 million) was completed and 90 houses provided for local residents.

25. Also during 1992, the Federal Government assisted with the restructuring of the local Cocos (Keeling) Islands Council to enable it to assume the powers and functions of a Western Australian shire council. Council elections are conducted in accordance with applied Western Australian local government laws. Normal funding sources available to local governments in Western Australia have also been extended to the Council, including general purpose assistance grants. For the purposes of enrolment and voting in elections for the Federal Parliament, the Cocos (Keeling) Islands are part of the Federal Division of the Northern Territory.

### Christmas Island

26. The Territories Law Reform Act 1992 which applies to the Cocos (Keeling) Islands applies in a similar way to Christmas Island. Thus, on 1 July 1992, almost all the statutes and all the common law of Western Australia were applied as the law of Christmas Island. Service delivery arrangements have been concluded with the Western Australian government to ensure the efficient delivery of services. The Christmas Islanders elected their first shire council in December 1992. For the purposes of enrolment and voting in elections for the Federal Parliament, Christmas Island is part of the Federal Division of the Northern Territory.

### Norfolk Island

27. Under the Federal Norfolk Island Act 1979, Norfolk Island has a large measure of self-government. The Norfolk Island Legislative Assembly has a range of local and state-type powers broadly comparable with the Australian Capital Territory and the Northern Territory. The Federal Government retains the power of veto over legislation in some areas, e.g. fishing, education and industrial relations. The Norfolk Island Legislative Assembly also has restricted powers in relation to some federal-type powers such as local immigration, customs and social security.

28. The position of Norfolk Islanders who are Australian citizens and who wish to vote in federal elections is provided for in the Norfolk Island (Electoral and Judicial) Amendment Act 1992. That Act amended the Federal Electoral Act 1918 to allow non-compulsory enrolment of Norfolk Islanders in any division in Australia (with the exception of the divisions of Fraser in the Australian Capital Territory, and the Northern Territory), under specified conditions.

29. The Legislative Assembly of Norfolk Island is elected for a three-year term, but may in certain circumstances be dissolved sooner by the island's Administrator. Voting in the Norfolk Island's elections is compulsory for persons whose names are on the Assembly electoral roll. The Legislative Assembly Ordinance 1979 provides for postal and pre-poll voting, scrutineering and security of the count.

### Indigenous peoples

30. The Australian Government has been following closely the international debates concerning self-determination in its application to indigenous peoples. Information on the measures by which the Australian Government is

seeking to advance the economic, social and cultural development of indigenous Australians is provided in the section of this report relating to article 27.

31. During the Human Rights Committee's consideration of Australia's second report in 1988, the Committee asked about Australia's position in relation to the concerns of some Torres Strait Islanders relating to self-management and autonomy. A new organization, the Torres Strait Regional Authority was established on 1 July 1994 with the aim of giving Torres Strait Islanders a greater say in how programmes and services are delivered to them in the Torres Strait.

32. The Torres Strait Regional Authority's Corporate Plan (1994-1995) outlines the organization's visions and goals as follows:

> To empower Torres Strait Islanders to determine their own affairs based on their unique Ailan Kastom bilong Torres Strait from which they draw their unity and strength;
>
> To gain recognition of Torres Strait Islanders' rights, customs and identity as indigenous peoples;
>
> To improve the quality of life of all peoples living in the Torres Strait;
>
> To develop a sustainable economic base, provide better health and community services, and ensure protection of the environment;
>
> To assert native title to the lands and waters of the Torres Strait.

33. The Torres Strait Regional Authority is responsible for:

> Deciding the funding level and type of programmes in the Torres Strait area;
>
> Helping to draw up and implement plans for improving the area;
>
> Representing local people and advocating their interests;
>
> Electing a commissioner to the Aboriginal and Torres Strait Islander Commission to represent the Torres Strait area; and
>
> Producing an annual report on its activities.

## All Peoples

34. The Human Rights Committee also asked Australia to outline its position on the struggle for self-determination of the people of Namibia, South Africa, Palestine and New Caledonia.

35. In the international arena, the Australian Government actively advocates and votes for decolonization and for the right of non self-governing territories to self-determination.

36. In relation to Namibia, Australia strongly supported efforts to achieve Namibian independence and was pleased to welcome Namibia into the ranks of the Commonwealth. Australia provided 300 army engineers and electoral personnel to the United Nations Transition Assistance Group (UNTAG) through the transition period following Namibian independence in 1990.

37. In South Africa, through participation in multilateral sanction regimes, Australia was instrumental in the South African decision to dismantle the system of apartheid.

38. With regard to Palestine, Australia has been a strong and active supporter of the peace process. For many years, successive Australian Governments have supported the idea of a comprehensive settlement based on implementation of United Nations Security Council resolutions 242 (1967) and 338 (1973). Australia has been committed to supporting the right of all countries in the region to exist within secure and recognized boundaries, and the right to self-determination of the Palestinian people.

39. Finally, Australia believes that the interests of New Caledonia and regional stability require a peaceful, orderly transition to genuine self-determination. A viable long-term political status will recognize the rights of the indigenous people, safeguard the rights of all other long-term residents and retain the goodwill of France and its positive involvement in the Pacific.

## Article 2

### General

40. As outlined in the core document, law in Australia is derived from the following sources: the common law and legislation and subordinate legislation from both the Federal Parliament and any of the six state or the three territory parliaments which have a form of self-government. Rights in the Covenant may be guaranteed by any of these sources of law.

41. In Australia, the Covenant and other treaties are not "self-executing". The provisions of treaties to which Australia has become a party do not become part of domestic law by virtue only of the formal acceptance of the treaty by Australia (although, in relation to their effect on the executive, see under article 24 below). Thus, to ensure conformity with the Covenant throughout Australia, from 1968 until ratification of the Covenant in 1984, the Federal Government undertook extensive consultations with state governments. The aim of these meetings was, first, to identify provisions in the law which were inconsistent with the Covenant and second, to propose rectifying action or an appropriate reservation.

42. From 1985, the primary official forum for ensuring the compliance of states with the Covenant is a committee comprised of federal and all state attorneys-general in Australia. The committee is known as the Standing Committee of Attorneys-General (SCAG). This consultative process enabled Australia to accede, on 25 September 1991, to the first Optional Protocol to the Covenant.

43. These cooperative arrangements between the federal and state governments have enabled the insights of one jurisdiction to be shared with other jurisdictions. Further, the cooperation of the state governments is indispensable to the preparation of reports under the Covenant, so that a consolidated account of Australian law and practice can be rendered.

44. The legislative regime on Norfolk Island lacks legislation ensuring human rights. Federal legislation does not extend to the island unless it is expressly stated in the legislation to so extend. The Commonwealth has made a commitment to consult with the Norfolk Island government on the extension of Commonwealth legislation, including human rights legislation, to the island.

45. Further detailed commentary on the first paragraph of article 2 will also be relevant to other articles of the Covenant. Accordingly, commentary on this paragraph is subsumed in the discussion below of the specific rights and freedoms guaranteed by the Covenant.

## Human rights regime

46. The institutional machinery protecting the rights recognized in the Covenant is detailed in the core document, together with an outline of the legislation which establishes that machinery.

### Current legislation

47. The federal and state governments have enacted legislation which makes discrimination unlawful in major areas of public life on grounds such as a person's race, sex, marital status, pregnancy, sexuality and physical or intellectual impairment. Complaints are investigated and attempts are made at conciliation by various anti-discrimination and equal opportunity boards. This legislation is discussed in detail in relation to the relevant article of the Covenant, notably in relation to article 26. For now, it is convenient merely to list the major pieces of legislation.

#### Federal

Sex Discrimination Act 1984
Racial Discrimination Act 1975
Disability Discrimination Act 1992
Disability Services Act 1986
Human Rights and Equal Opportunity Commission Act 1986
Inspector-General of Intelligence and Security Act 1986
Public Service Act 1922
Industrial Relations Act 1988
Privacy Act 1988
Freedom of Information Act 1982
Ombudsman Act 1976

Australian Capital Territory

Discrimination Act 1991
Guardianship and Management of Property Act 1991
Community Advocate Act 1991

New South Wales

Anti-Discrimination Act 1977
Industrial Relations Act 1991
Ombudsman Act 1974

Northern Territory

Anti-Discrimination Act 1992
Ombudsman (Northern Territory) Act 1978

Queensland

Anti-Discrimination Act 1991
Criminal Justice Act 1989
Health Rights Commission Act 1991

South Australia

Equal Opportunity Act 1984
Public Sector Management Act 1995
Industrial and Employee Relations Act 1994
Freedom of Information Act 1991
Ombudsman Act 1972
Police (Complaints and Disciplinary Proceedings) Act 1985
Guardianship and Administration Act 1993
Mental Health Act 1993

Tasmania

Sex Discrimination Act 1994

Victoria

Equal Opportunity Act 1995
Mental Health Act 1986
Intellectually Disabled Persons Act 1986
Guardianship and Administration Board Act 1986
Ombudsman Act 1973

Western Australia

Equal Opportunity Act 1984

48. Paragraph 3 of Article 2 requires each State Party to ensure effective remedies to individuals. An overview of the international and federal remedies available to individuals for human rights violations in Australia

and the agencies involved is provided in the Core Document. The following discussion focuses first, on recent amendments to federal legislation and second, on remedies provided by state governments.

49. At the outset, however, it should be noted that Australia believes that not every matter concerning human rights is properly dealt with by resort to additional legal sanctions. In many cases, rights are better preserved by less formal processes, often associated with inquiry, conciliation and report. Methods such as special parliamentary committees or royal commissions may be appropriate to determine the balance between rights and obligations, which is an inherent part of the method by which human rights and freedoms are protected and promoted. Of course, where a matter is capable of precise legislative definition and traditional law enforcement, this method is also available.

## Human Rights and Equal Opportunity Commission Act 1986

### Federal legislation adopted since the submission of the previous report

50. The Human Rights and Equal Opportunity Commission Act 1986 established the Human Rights and Equal Opportunity Commission (HREOC) to oversee the observance of human rights in Australia. The structure, functions and powers of HREOC are outlined in the core document. In essence, HREOC is a statutory authority which receives complaints of discrimination under the Racial Discrimination Act 1975 (see under article 26 below), the Sex Discrimination Act 1984 (see under article 26), the Disability Discrimination Act 1992 (see below), the Privacy Act 1988 (see under article 17) and in relation to other human rights. HREOC also has broad policy functions such as:

Conducting research, educational and other programmes to promote acceptance, understanding and public awareness of human rights;

Examining existing and, when required by the Attorney-General, proposed federal legislation for consistency with human rights;

Reporting to the Federal Parliament on laws that should be made or other action that should be taken in relation to human rights to comply with Australia's international obligations on human rights; and

Examining actions or practices of federal authorities or actions under federal law for consistency with human rights.

51. The Commission may also inquire into acts or practices in the federal, state or private sectors concerning complaints of discrimination in employment.

52. "Human rights" are defined for the purposes of the Act as those rights set out in various instruments scheduled to or declared under the Human Rights and Equal Opportunity Act 1986. The following international instruments are attached to the Act in that way: the International Covenant on Civil and Political Rights; the Declaration on the Rights of the Child; the Convention on the Rights of the Child; the Declaration on the Rights of Disabled Persons; the Declaration on the Rights of Mentally Retarded Persons;

International Labour Organization Convention No. 111; and the Declaration on the Elimination of All Forms of Intolerance and of Discrimination based on Religion or Belief.

53. Grounds for complaint include discrimination on the basis of race, colour, religion, age, political opinion, national extraction, immigration (or that of a relative or associate), social origin, medical or criminal record, sexual preference, sex, trade union activity, marital status, pregnancy and physical or intellectual impairment in areas of public life such as employment, education, accommodation, and the provision of goods and services. There is also provision for complaints of victimization to be made, for example, where a complainant is victimized as a result of having made a complaint.

54. HREOC is empowered to attempt to reach a conciliated settlement of human rights complaints against federal authorities, and to report to the Attorney-General if such a settlement cannot be reached.

55. In February 1995 the High Court of Australia ruled that the legislative means by which the determinations of HREOC made under federal anti-discrimination and privacy legislation were previously enforced, that is by registration of the decision of the Commission with the Federal Court, was constitutionally invalid. The decision meant that, while HREOC could continue to make determinations that discrimination had occurred, these could not be enforced.

56. The Federal Government has reinstated an earlier scheme to enforce HREOC determinations as an interim measure. Under this scheme, the decision is subject to a de novo hearing in the Federal Court.

### Disability legislation

57. Since the submission of the second report of Australia, the Federal Government has acted to improve the rights of people with a disability through two pieces of legislation, one focused on eliminating discrimination (the Disability Discrimination Act 1992), the other on the infrastructure for service provision (the Disability Services Act 1986).

58. The Disability Discrimination Act 1992 came into operation on 1 March 1993 and makes discrimination on the basis of disability unlawful in the following areas: land; employment; education; access to premises; provision of goods, services and facilities; accommodation; clubs; sport; and administration of federal laws and programmes.

59. The Act makes unlawful both direct and indirect discrimination on the basis of disability. Direct disability is broadly defined to include, among other things, the loss, partial loss or impairment of physical or mental functions, and the presence in the body of organisms causing or capable of causing disease or illness. Discrimination on the grounds of disability is defined as treating or proposing to treat an aggrieved person less favourably than the discriminator treats, or would treat, a person without a disability in circumstances that are the same or not materially different.

60. The legislation binds the states and operates concurrently with existing state laws in this area. The Act will however, override state legislation to the extent of an inconsistency.

61. The Act provides for limited exemptions in certain circumstances. These relate to combat-related duties, superannuation and insurance, infectious diseases, charities, telecommunications, pensions and allowances, migration and peacekeeping services, special measures, and acts done by statutory authorities. The Human Rights and Equal Opportunity Commission may also grant exemptions. The provisions limiting the application of these exemptions are found in Part 3, division 5 of the Disability Discrimination Act 1992.

62. As an interim measure, the Act also provides for a three-year exemption period, during which time a person acting in accordance with an inconsistent federal or state law will not be found to be in breach of Part 2 of the Act, (which sets out the areas of discrimination referred to above). The three-year period ended on 1 March 1996 and federal and state governments have reviewed their legislation to ensure consistency with the Act. On the expiry of the three-year period, governments may seek to have laws prescribed for the purposes of the Act. A person acting in accordance with a prescribed law will not be found to be in breach of Part 2 of the Act. There have been more than 700 complaints lodged under the Act in the reporting period.

63. The Federal Attorney-General has established the Disability Discrimination Act Standards Working Group to advise him on the possible form and content of disability standards which may be authorized by the Attorney under the Act. The Working Group has produced an issues paper on matters arising for consideration in relation to the standards. The paper was distributed to state governments and comments have been received. As a result, three bodies have now been established to develop standards in the areas of transport, access to premises and employment. An issues paper on employment standards and a draft accessible transport standard have been developed and released for public comment.

64. On 9 December 1994, the Federal Government launched the Commonwealth Disability Strategy, designed to provide a plan of action to deal with systemic disability discrimination and to implement the objectives of the Disability Discrimination Act 1992 from a federal government perspective. The approach is based on the Standard Rules on the Equalization of Opportunities for Persons with Disabilities.

65. The second Act mentioned above is the Disability Services Act 1986. This Act was introduced in response to community calls for urgent and fundamental reforms in the area of service provision for people with disabilities. The Act is targeted at people with physical, psychiatric, intellectual or sensory impairment. It enables a more flexible range of support services to be provided to people with disabilities, for example, in the areas of accommodation, employment and community participation. The number of advocacy services has also been significantly expanded.

66. A major component of the Disability Services Act 1986 was a Statement of Principles and Objectives which identifies the Federal Government's views

on how services for people with disabilities should be developed and delivered. The principles focus on the right of people with disabilities to enjoy rights all other members of Australian society enjoy, for example, the right to respect, dignity, development, quality of life, choice, the least restrictive alternative and the pursuit of grievances. The principles also promote the achievement of outcomes such as competence, self-reliance, participation and image.

67. As part of the Australian Law Reform Commission's overall review of legislation administered by the Department of Human Services and Health, the Commission is currently reviewing the Disability Services Act 1986.

68. Finally, in order to avoid federal/state inconsistency in disability services, in 1991 Australian governments entered the Commonwealth/State Disability Agreement. Under the Agreement, the Federal Government has the administrative responsibility for employment services for people with disabilities. The states have administrative responsibility for the provision of accommodation and support services for people with disabilities. Areas such as advocacy, research and development continue to be the responsibility of both the federal and state governments.

69. State governments have enacted legislation complementary to the Disability Services Act 1986 as part of their obligations under the Commonwealth/State Disability Agreement.

70. The Federal Government has established a national network of Disability Discrimination Legal Advocacy Services (as well as a specialist HIV/AIDS legal centre in New South Wales) funded through the Federal Community Legal Centre Program. These services, located in every state and territory, provide legal advice and assistance to people who believe that they have been discriminated against on the grounds of disability and who wish to lodge a complaint under the Act.

## Aboriginal and Torres Strait Islander Social Justice Commissioner

71. In December 1992, the Federal Parliament passed the Human Rights and Equal Opportunity Amendment Act (No. 2). This legislation established the position of Aboriginal and Torres Strait Islander Social Justice Commissioner. The Act came into effect on 13 January 1993 and Mr. Michael Dodson commenced as the first Commissioner on 16 April 1993.

72. The Commissioner's major responsibility is to prepare for the Federal Government an annual report on the enjoyment and exercise of human rights and fundamental freedoms by Aboriginal and Torres Strait Islander peoples. In addition, the Commissioner monitors the operation of the Native Title Act 1993. This Act provides statutory recognition of customary land rights for Australian indigenous peoples and is discussed further in the commentary on article 27 below. In relation to this Act, the Commissioner has responsibility for the preparation of an annual report on its operation and its effect on the exercise and enjoyment of human rights by Aboriginal and Torres Strait Islander peoples. The Act also gives the Minister the right to request the Commissioner to prepare a report on any matter relating to the

rights of indigenous peoples under the Act. The Commissioner is also charged with undertaking social justice educational and promotional activities for indigenous Australians.

## Current Initiatives

### SCAG Working Group on Human Rights

73. A Working Party on Human Rights was established at the November 1995 meeting of the Standing Committee of Attorneys-General. The aim of the Working Party is to improve national coordination on human rights issues. It has the task of working towards a coordinated national strategy on human rights and will also provide a base for future cooperation in satisfying Australia's international human rights responsibilities.

### Human Rights Forum for Non-Governmental Organizations

74. The Federal Government has liaised extensively with the states in the preparation of reports. The Federal Attorney-General's Department has also trialed different approaches to consultation with non-governmental organizations. In the case of the present report, the Federal Attorney-General's Department provided limited funding to the Human Rights Council of Australia Inc. to coordinate and compile a non-governmental report, which was taken into consideration in preparing the present report.

75. The Federal Government has announced that it will establish a regular forum for non-governmental organizations to exchange information and discuss domestic human rights issues and developments. Non-governmental organizations currently meet regularly in a forum hosted by the Department of Foreign Affairs and Trade to consider human rights from the international perspective. A similar forum coordinated by the Attorney-General's Department will meet to discuss human rights issues from a domestic perspective.

76. The Forum will provide non-governmental organizations with a focused opportunity to exchange information and to discuss domestic human rights issues and developments. The Forum will enable the Government to involve non-governmental organizations more directly in the process of the preparation of Australia's treaty reports. Reports from non-governmental organizations could be presented at the Forum, providing additional information for the development of treaty reports.

### Inquiry into the removal of Aboriginal children

77. Under past assimilationist policies many Aboriginal children were forcibly removed from their families. The 1994 Australian Bureau of Statistics survey of Aboriginal and Torres Strait Islander people revealed that over 10 per cent of Aboriginal people over the age of 25 reported being taken away from their natural families.

78. The Commission is required to report its findings to the Attorney-General. It will:

> Trace the past laws, practices and policies which resulted in the compulsory separation of Aboriginal and Torres Strait Islander children from their families and the effects of those laws, practices and policies;
>
> Examine the adequacy of, and the need for any changes in, current laws, practices and policies relating to the placement and care of Aboriginal and Torres Strait Islander children today, and the services and procedures currently available to those people who were affected by the removal practices (including, but not limited to, access to records and assistance with reunification of families); and
>
> Examine the principles relevant to determining the justification for compensation for affected persons.

79. Sir Ronald Wilson, the President of the Human Rights and Equal Opportunity Commission, the Race Discrimination Commissioner and the Aboriginal and Torres Strait Islander Social Justice Commissioner are the commissioners with main carriage of the inquiry on behalf of the Human Rights and Equal Opportunity Commission. The inquiry had not been completed during the period covered by this report.

## Article 3

### Equality for women

80. Historically, there were provisions in Australian law which are now regarded as having discriminated against women. Progressive reform of the law is increasingly removing these provisions. In practice, however, women feature less prominently in public life than do men. In 1995, women made up around 16 per cent of all federal and state parliamentarians. In January 1995, there was one woman on the seven member High Court of Australia, five women on the 42 member Federal Court of Australia and eight women on the 54 member Family Court of Australia. In May 1995, around a quarter of Australian managers and administrators (covering positions ranging from supervisory to senior management) were women.

### Anti-discrimination legislation

81. The Federal Government and all state governments have enacted legislation which, subject to a limited number of exceptions, proscribes discrimination on the ground of sex (and the related grounds of marital status and pregnancy). The proscription applies in areas such as employment, education, accommodation, club membership and the provision of goods and services. Details of the operation, scope and effect of the federal and state legislative regimes are discussed under article 26 below.

82. Federal and most state governments have concluded a series of cooperative enforcement arrangements. The arrangements provide a means by which people in those states who wish to lodge complaints can attend a single office handling both federal and state legislation for advice.

## Government machinery

83. Executive responsibility for the status of women in the Federal Government lies with the Prime Minister who is aided by the Minister Assisting the Prime Minister for the Status of Women. Policy advice and administrative support is provided by the Office of the Status of Women, which is located within the Department of the Prime Minister and Cabinet. In line with the 1993 Review of Government Policy Advice Mechanisms on the Status of Women, ministers and portfolios implement and report on the Government's policies on the status of women. To facilitate this, most federal departments have a women's unit or a women's desk officer. An overview chart is provided in table 1.

84. Some states have special agencies concerned with ensuring equal opportunity for women. For example, in Queensland the Women's Policy Unit in the Office of the Cabinet, within the Premier's portfolio, has the responsibility of promoting and monitoring Queensland government policy to improve the position of women in Queensland. The Women's Policy Unit is also responsible for coordinating specific initiatives to address the needs of women in Queensland. In South Australia, the Office of the Status of Women performs a similar role. In April 1995 the New South Wales government created the first Department for Women to address a broad range of issues affecting women within a whole-of-government framework. This framework is intended to ensure a cross-portfolio involvement in meeting the needs of women, as well as promoting a consistent and innovative approach to advancing women's interests across all government sectors. In Western Australia, the Office of Women's Interests was realigned in October 1995 to become the Women's Policy Development Office. The realignment signals the Office's role in advancing the status of women in the state and reflects a customer service focus. The Tasmanian Government has also established an Office of the Status of Women to monitor policy issues affecting women.

## National Women's Justice Strategy

85. In May 1995, the Prime Minister announced the Federal Government's National Women's Justice Strategy, which incorporated a range of policy initiatives for increasing and improving women's access to justice.

86. A national network of women's legal centres is to be established to provide advice and assistance to women with legal problems in city and country areas. The Federal Government will provide funding over four years to establish these centres. Also, additional funding will be provided to enable the network of women's centres to establish specialist services for Aboriginal and Torres Strait Islander women.

## Maternity and paternity leave

87. Amended federal industrial relations legislation operative from 30 March 1994 enables parents who are permanent employees to share unpaid parental leave during their child's first 12 months. Except for a period of one week at the time of the birth, this maternity and paternity leave cannot overlap. This is because the main purpose of the provision is to enable the person who is on leave to be the child's primary care giver.

88. In 1995, a means tested maternity allowance, equivalent to six weeks of the maximum rate of parenting allowance (at the time of the announcement this was $816), was also announced. The maternity allowance will boost family income when it is most needed, at the birth of a baby. About 85 per cent of women who give birth will be entitled to the payment.

89. In the public sector, maternity leave with pay is provided for a significant proportion of women. Provision for fully paid maternity leave of 12 weeks has been made for employees of the Federal Government, the Northern Territory and the Australian Capital Territory, subject to a qualifying period of 12 months continuous service. Fully paid leave of nine weeks is available in New South Wales, subject to a 40-week qualifying period. In Victoria, fully paid maternity leave of 12 weeks is available subject to a qualifying period of 12 months continuous service. Means tested social security benefits are available to sole parents. In Tasmania, 12 months maternity leave is an entitlement, of which 12 weeks can be paid sick leave. In addition, adoption leave of 46 weeks is also available. Agreements often include an entitlement to paternity leave.

90. Most maternity leave in the private sector is unpaid. In Australia, working conditions are often governed by awards or enterprise agreements which in the federal jurisdiction are approved by the Australian Industrial Relations Commission. The Industrial Relations Act 1988 provides that in the performance of its functions the Australian Industrial Relations Commission is to take into account the principles embodied in ILO Convention 156, the Workers with Family Responsibilities Convention, 1981 in settling the terms of the award.

## Women's employment and education

91. Australian workforce participation by women is about average for developed countries. According to the Australian Women's Yearbook 1995, women's participation in the workforce has remained at around 52 per cent.

92. The participation rate for married women has been growing strongly, rising from 44.3 per cent in August 1985 to 55.2 per cent in August 1995. The participation in the labour force of women with a disability has increased from 40 per cent in 1988 to 46 per cent in 1993. Occupational and industry segregation has however persisted into the 1990s. Female employment has remained concentrated in the retail trade, health and community services and education. These four sectors accounted for, on average, about 44 per cent of all employed women. A large proportion of women are employed as clerks, salespersons and personal service workers. These occupational groups together account for around 55 per cent of all employed women.

93. The limited female participation in non-traditional areas, such as science, engineering and technology, has been addressed through various equity strategies and schemes supported by the Government. However, most research in the area focuses on education and not on barriers to women's participation in these traditionally male domains. While more women are undertaking training and study in sciences, engineering and technology fields, their career paths are likely to be different from those of men working in these occupations.

94. Women are active in all aspects of agricultural production and management, but are poorly represented in agricultural statistics and are hindered by the stereotype that women perform a subsidiary role in the agricultural sector.

95. In 1994, with the support of the Office of the Status of Women, the Australian Bureau of Agricultural and Resource Economics carried out survey research into the status of women on farms. This led to the participation of the Foundation for Australian Agricultural Women, the Country Women's Association of Australia and Women in Agriculture in a televised session of the Bureau's 1995 national Outlook Conference and to the inclusion of questions relating to women on farms in the Bureau's ongoing survey research programme. In addition, the first National Rural Women's Forum, held in Canberra in June 1995 worked towards a national policy agenda on rural women.

96. While increasing labour market participation by women has contributed to overall improvements in women's social and economic status, women continue to be over-represented in part time and casual employment. Casual employment is characterized by more limited access to benefits such as training, leave entitlements and superannuation, although casuals' wage rates are generally loaded to compensate for the nature of casual work and associated non-entitlement to benefits such as sick leave and annual leave. Around 22 per cent of female part-time workers in Australia would prefer to work more hours.

97. As with Australian women generally, indigenous women have improved their labour market participation, with employment growth of 45 per cent between 1986 and 1991. In 1994, 27 per cent of indigenous women and 45 per cent of indigenous men were employed. Over one third of indigenous women aged between 34 and 44 years were employed (this includes participation in the Community Development Employment Projects Scheme; see further under article 27, Employment, below). This employment rate, however, remains substantially below that of other Australian women and men.

98. While the ratio of female to male full-time adult average weekly ordinary time earnings (AWOTE) has been volatile over the last decade, there has been some narrowing of the gender earnings differential. The AWOTE ratio, as estimated by the average weekly earnings survey, rose marginally from 82.7 per cent in August 1985 to 84.0 per cent in August 1995. This gender earnings gap is significantly lower if managerial employees are excluded. The female to male AWOTE ratio for non-managerial full-time adult employees was 92.1 per cent in May 1994.

99. Examples of some recent Federal Government employment and training programmes are outlined below.

Jobs, Education and Training Program

100. Sole parent pensioners (usually women) are assisted when trying to enter, or re-enter, the paid workforce by the Jobs, Education and Training (JET) Program which commenced in March 1989. The JET Program is a cooperative venture by the Departments of Social Security, Employment, Education and Training, and Human Services and Health, with the Department of Social Security having overall responsibility. In 1993, it was extended to include:

Women born before 1937, who have no children;

Carer pensioners (i.e. people who are providing attendant home care for a severely disabled person); and

Some sole parents who receive special benefits because they do not meet the residency requirements for a sole parent pension (94 per cent of them are female).

Women's Employment, Education and Training Advisory Group

101. The Women's Employment, Education and Training Advisory Group (WEETAG) was established in 1988 to advise ministers of the employment, education and training portfolio on women's access to, and participation in, employment, education and training. Members comprise all appointed women serving on the National Board of Employment, Education and Training and its Councils and representatives from the industry sector, including private employers and unions. The WEETAG priority areas for 1994-1995 were:

Unemployment and its impact on women, particularly long-term unemployment;

The experience of part-time and casual women workers, in particular, the effects of structural adjustment, including the enterprise bargaining system for this group of workers and their access to training, job security and career advancement;

The national training reform agenda, including entry-level training, "credit transfer" and "recognition of prior learning" issues; and women in small business.

Women's Research and Employment Initiatives Program

102. The Women's Research and Employment Initiatives Program, administered by the Women's Bureau within the Department of Employment, Education and Training (DEET), was established in 1985 to:

Commission research relevant to policy development for women's employment and training;

Provide information concerning women in employment, education and training; and

Develop processes or strategies to enhance women's access to and participation in employment and training, and to improve their career options.

103. Priority areas for funding are set annually. In 1993-1994 the priority area was for projects to address the national training reform agenda from a women's perspective, including the effect of workplace reforms such as enterprise bargaining on women's access to training. In 1995, three priority areas were set - women and the Federal Government's employment, education and training policies outlined in the 1994 white paper Working Nation; an evaluation of the Women's Research and Employment Initiatives Program; and industry studies in the cultural, recreational, accommodation, cafe and restaurant industries.

### National Policy for the Education of Girls

104. The Federal Government has provided funding for projects which implement the National Policy for the Education of Girls and its National Action Plan for the Education of Girls 1993-1997. The Plan provides a structure for analysis by schools of the curriculum, girls' classroom experience, the behaviour of males towards females and changes in the social, physical and cultural environment in which girls learn. A wide range of performance indicators have been built into the plan's structure for the purpose of monitoring progress and improvement in these areas.

105. The Federal Government has provided funding for the work of the Ministerial Council on Education, Employment, Training and Youth Affairs' Taskforce on Gender Equity.

106. Further, the Gender Equity in Curriculum Reform Project supported the production of professional development materials which address the construction of gender, teaching a gender inclusive curriculum, and gender and the English curriculum. Gender equity curriculum consultants were appointed in each of the project teams undertaking the development of all national collaborative curriculum statements and profiles. Another outcome of the project was the incorporation of the principles and objectives of the National Policy for the Education of Girls in Australian Schools in the national curriculum statements and profiles for Australian schools.

107. The Federal Government has also provided funding for the Gender Equity Network (GEN) newsletter, which aims to promote the objectives of the National Policy and strategies for its implementation. The distribution of the newsletter has reached 35,000.

### The Australian National Training Authority

108. The Australian National Training Authority (ANTA) is responsible for developing and maintaining, in conjunction with the States, nationally agreed objectives, strategies and planning processes for national vocational education and training. It began operations on 1 January 1994. Its

objectives are to ensure vocational education and training meet the needs of industry, support an effective training market, promote an efficient network of publicly funded providers, increase opportunities and outcomes for individuals and improve links with other education sectors. As part of its portfolio it has funded the National Plan of Action for Women in Vocational Education and Training and a special equity programme.

109. Projects completed under the National Plan of Action for Women in Vocational Education and Training include:

> Child Care Alternatives: research projects which focused directly on access issues for Technical and Further Education (TAFE) students with family responsibilities. This project has now been completed resulting in relevant recommendations being made to Government and TAFE;
>
> Research projects on Recognition of Prior Learning for TAFE students. Information about prior learning assessment processes has been distributed; and
>
> Swings and Roundabouts: a research project which examined the likely impact of an open training market on women's participation in TAFE.
>
> The special equity programme is comprised of two parts: the Preparatory Courses for Women programme and Tradeswomen on the Move.

110. The Preparatory Courses for Women programme funds courses and activities in TAFE and secondary colleges to introduce women to trades and gives entry to an apprenticeship or pre-apprenticeship course. Tradeswomen on the Move is a joint federal/states strategy designed to encourage greater participation of young women in non-traditional trades, through school visits by female tradespeople.

### The Higher Education and Equity Program

111. The Higher Education Equity Program (HEEP) has provided annual funding of approximately $4 million to assist groups identified as being disadvantaged in terms of participation in higher education. These groups were identified in a 1990 policy paper, "A fair chance for all: higher education that is within everyone's reach", as being people with disabilities; people from socio-economically disadvantaged backgrounds; women, particularly in non-traditional areas of study and post-graduate courses; people from rural and isolated areas; and people from non-English-speaking backgrounds.

### Newsletter

112. The Department of Employment, Education and Training's Women's Bureau publishes a newsletter entitled "Women and work". It is aimed at promoting equity for women in the areas of employment, education and training, and has a circulation of 10,000 per issue.

## Women in the Defence Force

113. Prior to 1990, the Federal Government's policy was to disallow women participating in combat or combat-related duties. This was reflected in the exemption in section 43 of the Sex Discrimination Act 1984 relating to the deployment of women in combat duties and combat-related duties. In 1990 however, the Federal Government approved a policy that had the effect of opening up many more defence force positions to women. As a result, 99 per cent of positions in the Navy and Air Force and 67 per cent of those in the Army are now open to women. Women remain prohibited from positions with duties requiring a person to commit, or to participate directly in the commission of, an act of violence against an adversary in time of war. This includes the following units: armour; artillery; infantry; and combat engineers in the Army; clearance divers in the Navy; and ground defence units in the Air Force.

114. On 16 December 1995, the Governor-General assented to the Sex Discrimination Amendment Act 1995. This Act amended section 43 of the Sex Discrimination Act to narrow the exemption extended to the Australian Defence Force so it now only applies to combat duty.

115. In 1994 the issue of the sexual harassment in the Navy became the subject of public debate arising from allegation of incidents of sexual harassment that occurred on HMAS Swan during a tour of duty in South-East Asia during 1992. The most serious allegation was that of sexual assault of a female medical officer by a fellow officer. In 1994, allegations resulted in an inquiry by the Senate Standing Committee on Foreign Affairs, Defence and Trade. While the inquiry was focused primarily on sexual harassment in the Navy, the Committee also inquired into the nature and extent of sexual harassment throughout the Australian Defence Force. The Standing Committee's report on sexual harassment in the Australian Defence Forces, Facing the Future Together, has been tabled in the Federal Parliament.

116. The Committee firmly endorsed the principle of equal opportunity for women in the Australian Defence Force and emphasized that, in order to achieve integration, personnel at all levels must be educated on gender-related issues. The report contains 42 recommendations, some with multiple parts, resulting in a total of 66 distinct components. Topics ranged from redefining policy documents and improving training and education programmes to the severity of censure handed down to personnel from HMAS Swan. Of the 66 components, the Federal Government supported 53, 4 were supported in principle, 5 were supported in part, 2 were not supported and 2 were under examination.

## Affirmative action

117. The Affirmative Action (Equal Employment Opportunity for Women) Act 1986 applies to all non-governmental organizations which employ more than 100 staff. It requires those bodies to report their progress in the implementation of equal employment opportunities to the Director of Affirmative Action. An essential part of each affirmative action programme

is that employers must set objectives and forward estimates, and monitor and evaluate these annually. However, no quotas need be set and employers are not obliged to take any action incompatible with the merit principle.

118. The South Australian Government Management and Employment Act 1985 requires the principle of non-discrimination on the ground of sex, sexuality, marital status, pregnancy, race, physical impairment or any other ground to be observed in personnel management in the public sector. The Tasmanian State Service Act 1984 includes provisions designed to protect the employment opportunities for women in the Tasmanian public service. The obligation to prepare and implement equal opportunity management plans in New South Wales public sector employment was gradually adopted in that state as a result of amendments in 1980 to the Anti-Discrimination Act 1977. The Western Australian Equal Opportunity Act 1984 makes similar provision in regard to public employment in that state. The Queensland Equal Opportunity in Public Employment Act 1922 requires public sector agencies to develop equal employment management plans to promote equal opportunity for and eliminate unlawful discrimination against specified groups, including women.

Violence against women

119. Significant progress has been made in terms of providing support for women subjected to violence, ensuring a strong criminal justice response and addressing community attitudes. A broad definition of violence has been recognized in the development of policies and programmes.

120. There is a paucity of national data on violence against women, particularly in regard to the incidence of such violence. Current estimates of the extent of the problem come from a variety of sources, such as reported data from police, courts and women's services, and from local research and surveys, such as phone-ins. This cannot be aggregated into national data because of differing methodologies in collecting the data. Much violence against women is unreported. For example, a recent survey found that 75 per cent of sexual assaults are not reported to the police and that the main reasons given for not reporting were because it was a "private matter" and for "fear of reprisal".

121. Consultations undertaken by the Federal Government over the last two years indicate that violence and fear of violence remain major concerns for women. Accordingly, action at both the federal and state levels remains a priority and has been addressed in a number of ways.

National Women's Justice Strategy

122. Funding has been allocated to address violence in family relationships. First, two pilot programmes have been developed within existing federally funded counselling agencies to test approaches to dealing with the issue of violence in families. Secondly, training in violence issues has been implemented for service providers in order that women who seek help can consistently receive a sensitive skilled response.

123. The two pilot projects have been established in marriage/relationship counselling agencies to provide support for women and children, target men

with responsibility for their violent behaviour and provide assistance to achieve the safety of all family members and the cessation of physical and/or sexual violence. The projects will provide a whole-of-family response, including groups for women and children who have been the targets or witnesses of family violence.

124. Under the National Women's Justice Strategy, the Australian Institute of Criminology is funded to coordinate research on the criminal justice response to violence against women so that the Federal Government will have reliable national data to assist future policy development in this area.

### National Strategy on Violence Against Women

125. The Commonwealth/State National Committee on Violence Against Women (NCVAW) operated between 1990 and 1993. In 1992, NCVAW produced a National Strategy on Violence Against Women. The strategy identified key objectives and provided directions for action using the framework of ministerial councils, because of the considerable responsibility of state governments for legislation, policy and programmes relating to violence against women.

126. In 1993, the NCVAW established a Clearinghouse on Violence Against Women. The Clearinghouse provides a central point for the dissemination of information about violence against women. See also under article 27, Indigenous women, below.

### Community education

127. In 1995, the Federal Government commissioned a national survey on community attitudes to violence against women (including, but broader than, domestic violence). Many of the results are encouraging. There is a greater community awareness and understanding of domestic violence in 1995. Of note is the congruency between the attitudes of men and women. Significant gender differences emerge only in relation to the women's greater fear of violence and the greater seriousness with which they regard non-physical forms of violence.

128. While the understanding of domestic violence in the community has increased, there is still reluctance to take action and a tendency to blame the victim. This would seem to indicate that greater community awareness has not translated into personal behavioural change.

129. The Federal Government has contributed to raising people's awareness of violence against women through a series of community education programmes. The National Domestic Violence Education Program ran over a three-year period to June 1990. The Commonwealth Community Education Program, Stop Violence Against Women, was funded until 1995. It provided for publicity campaigns, community grants and special projects.

### Domestic violence regimes

130. Australia recognizes that domestic violence affects both men and women. However, it is an issue that is particularly significant to women.

131. The Family Law Act 1975 contains provisions which enable adults to obtain injunctions for personal protection. A parent or a separate representative for the child may obtain an injunction for personal protection on behalf of a child.

132. In 1995, the Family Law Act 1975 was also amended to ensure that the Family Court considers the effect of family violence when making orders in relation to children (see further under article 24, Best interests of children, below).

133. In addition to the legislation described below, governments also provide assistance to privately run youth and women's refuges. In particular, the Federal Crisis Accommodation Program, introduced in July 1984, provides capital funding through state governments for short-term emergency accommodation for families unable to live in their normal home. The federal/state funded Supported Accommodation Assistance Program also provides a range of supported accommodation and related support services to assist men, women, young people and their dependants who are either permanently homeless or temporarily homeless as a result of crisis and who need such assistance to move towards independent living where possible and appropriate. These programmes are in addition to other programmes of assistance in housing and accommodation.

Australian Capital Territory

134. Two restraining order regimes exist in the Australian Capital Territory. Victims of domestic violence not eligible under the Domestic Violence Act 1986 may seek other orders under the Magistrates Court Act 1930. The following comments are with respect to the Domestic Violence Act 1986.

Eligibility

135. Under the Domestic Violence Act 1986, a present or former spouse or de facto spouse, a child of either party, a relative, or a household member other than a tenant or boarder, is eligible to apply for a domestic violence protection order. Either the eligible person or a police officer may apply for an order where the respondent has committed or has threatened to commit a domestic violence offence.

Order

136. The court may make an order restraining the respondent from engaging in the conduct complained of and/or conduct that would constitute any domestic violence offence. One or more specified prohibitions and conditions may be imposed, including prohibiting the respondent from entering certain premises, from assaulting, contacting, harassing, threatening or intimidating the victim personally or through another person and from damaging the victim's property.

137. When making an order, the court's paramount consideration is the protection of the applicant and any child from violence or harassment.

138. It is within the discretion of the court, when making an order, to recommend that the respondent, applicant or any other person participate in counselling.

139. An interim order of up to 10 days may be made without the respondent being served, if necessary to ensure the safety of the applicant. Protection orders can remain in force for up to 12 months.

### Weapons

140. An order automatically cancels the respondent's licence to hold a weapon unless, on application at the time of the order, the court is satisfied otherwise. The court may order the seizure and detention of any dangerous weapon in the respondent's possession.

### Breach of order

141. Breach of a protection order is a punishable offence. A fine not exceeding $1,000 or imprisonment of up to six months, or both, may be imposed upon conviction.

### Reform

142. The Australian Capital Territory Community Law Reform Committee has reviewed the law in force in the Australian Capital Territory in regard to domestic violence. Its report was tabled in the Australian Capital Territory Legislative Assembly on 14 December 1995.

143. The report addresses the criminal justice response to domestic violence in the Territory, including issues such as arrest, court procedures, collection of statistics, preventive detention, bail procedures for violent offenders, specialist training for those involved in the court process and the use of behavioural change programmes as sentencing options. The Committee has made 110 recommendations, the focus of which is upon the criminality of domestic violence and placing responsibility for that violence upon offenders. The recommendations of the Committee envisage an integrated response by all sectors of the criminal justice system to domestic violence.

## New South Wales

144. In 1993, the Crimes (Domestic Violence) Amendment Act was introduced with the aim of assisting the community to recognize that domestic assault is a criminal offence and of making the police and courts more effective in dealing with the problem. The legislation expands the protection offered to victims of domestic violence and reflects the community's abhorrence of violence within families. It amends Part 15A of the New South Wales Crimes Act 1900, which deals with Apprehended Violence Orders (AVOs).

### Applicability

145. The Crimes Act 1900 has general application and includes domestic relationships. A "domestic relationship" includes a former or existing

spouse or de facto spouse, a household member other than a tenant or boarder, a relative or a person who has had an intimate personal relationship with the defendant.

146. AVOs may be sought by any victim of over 16 years or by a police officer on behalf of the victim. A police officer is obliged to make a complaint where the victim is under 16 years of age or where the police officer is of the view that a domestic violence offence has been or will be committed.

### Criteria

147. An AVO protects a person who has reasonable grounds to fear and in fact fears that another person will commit a personal violence offence against him or her, or engage in conduct amounting to harassment, molestation, intimidation or stalking.

### Orders

148. The court may make an order imposing such prohibitions or restrictions on the behaviour of the defendant as appear necessary or desirable to the court. Stalking and intimidation are now a standard prohibition under protection orders and are also a separate offence attracting a maximum penalty of two years imprisonment or a $5,000 fine, or both.

149. An ex parte order can be made if the defendant has been served and fails to attend the hearing. It has full effect once it is served on the defendant.

150. An interim order can be made when it is "necessary or appropriate" to do so and has effect until a final order is made, thus ensuring a continuum of protection.

151. The Crimes (Domestic Violence) Amendment Act 1993 makes provision for applications for telephone interim orders to be made by a police officer to an authorized justice outside normal court hours. An order remains in force for the period specified, and if not specified, for six months.

### Weapons

152. Under the New South Wales Firearms Act 1989, a final AVO automatically revokes and an interim order suspends any licence to possess a firearm. Furthermore, the court may make an order prohibiting or restricting the possession of all or any specified firearms by the defendant and require the defendant to dispose of firearms in his or her possession and surrender any firearms permit or licence held.

153. The Commissioner of Police must refuse an application for a firearm licence or permit if, in the past 10 years, the applicant has been subject to an AVO, unless the AVO has been revoked.

### Breach of an order

154. Contravention of an AVO is an offence punishable by a maximum penalty of 50 penalty units (currently $5,000), imprisonment for two years, or both.

155. Where the breach of a protection order involves a violent act, the person must be sentenced to a term of imprisonment, unless the court otherwise orders, or the offender is less than 18 years. Where imprisonment is imposed, the court must consider a full psychiatric or psychological assessment and pre-sentence report on the person. Where the court does not impose imprisonment, it must give reasons.

156. Following the Bail (Domestic Violence) Amendment Act 1993, there is a departure from the presumption in favour of bail where an existing order is contravened by an act of violence or where a domestic violence offence has been committed.

### Additional provisions

157. A police officer who makes or is about to make an application for a telephone interim order may direct the respondent to remain at the scene of the incident, and if the person refuses, the officer may arrest and detain the person at the scene until the order is made and served.

## Norfolk Island

158. Norfolk Island enacted domestic violence legislation in February 1995. The legislation provides for a broad range of restraint and protection orders and is supported by an infrastructure of community organizations.

## Northern Territory

159. Following a review of the operation of the Domestic Violence Act 1992, major amendments came into force on 1 May 1995. The amendments broaden the categories of people eligible to apply for restraining orders in relation to domestic violence.

### Eligibility

160. An application for a restraining order may be made by a police officer or a person in a domestic relationship with the defendant, against whom the behaviour is likely to be directed.

161. The protection of a restraining order is now available to any person who is or has been in a domestic relationship with the other person. "Domestic relationship" includes any person who is or has been a relative of the other person including spouses and de facto spouses according to Aboriginal tradition. All relatives up to and including great-great relatives according to law (step parents and children) and relatives according to Aboriginal tradition or contemporary social practice are also included. "Domestic relationship" also includes any person who has or has had the custody or guardianship of or right of access to the other person or vice versa, anyone who ordinarily resides or had resided with the other

person or with a relative of the other person, anyone who is or has been a relative of a child of the other person, and anyone who has or has had a relationship with the other person, who is a member of the opposite sex, though the two may live apart.

### Criteria

162. The court must be satisfied, on balance of probabilities, that the defendant has assaulted or caused personal injury to a person with whom the defendant is in a domestic relationship, or damaged property in the possession of that person, or threatened such behaviour and is, unless restrained, likely to repeat the behaviour or carry out the threat. Additional grounds are that the defendant behaved in a provocative manner towards another person, including, but not limited to, behaviour that might cause another person reasonably to fear violence or harassment.

### Orders

163. The court may impose such restraints as it considers necessary to prevent the defendant from acting in the apprehended manner, including some specified positive orders, for example an order for the return of personal property or restraining access to premises. The duration of the order is for the period specified. A telephone order may be made by a police officer. The court or a clerk may make an interim *ex parte* order.

### Weapons

164. The Northern Territory Firearms Act, which came into force in March 1993, requires a court that orders a person holding a weapons certificate of registration, licence or permit to keep the peace pursuant to the Domestic Violence Act 1992, to revoke the certificate, licence or permit, whether or not that firearm is implicated in the incident, unless satisfied otherwise.

### Breach of an order

165. Breach of an order is an offence. The minimum penalty is imprisonment for seven days, and the maximum penalty is imprisonment for six months.

### Queensland

166. The Queensland Domestic Violence (Family Protection) Act 1989 applies to the protection of spouses, relatives and associates of the applicant. For the protection of any other person who has been subjected to violence or harassment, resort must be had to the Peace and Good Behaviour Act 1982.

### Eligibility

167. An application for a domestic violence order under the Domestic Violence (Family Protection) Act 1989 may only be made by an existing or former spouse or de facto spouse, a person authorized in writing by the spouse to appear on her behalf or a police officer. "Spouse" includes people who are the biological parents of the child whether or not they have resided

together. The order may protect "relatives" and "associates" of the applicant and is broad enough to include, for example, the wider concept of "relative" in Aboriginal culture.

168. The police are empowered to, and in some cases must, seek orders to protect victims of domestic violence.

### Criteria

169. The court must be satisfied that the respondent has committed or threatened to commit an act of domestic violence against the applicant and is likely to repeat the conduct or carry out the threat. A spouse who procures another person to commit an act, that if done by the spouse would amount to domestic violence, is taken to have committed the act. "Domestic violence" includes wilful injury, damage to property, intimidation or harassment, indecent behaviour without consent, or a threat to commit any of these acts.

### Orders

170. The court may impose conditions that the court considers necessary in the circumstances and desirable in the interests of the applicant, named relative or associate and the respondent. When imposing conditions, the court's paramount consideration is the need to protect the applicant, relatives or associates, and the welfare of any child of the applicant.

171. A temporary order may be made, supported only by the evidence that the court considers sufficient and appropriate, having regard to its temporary nature.

172. Other orders may be enforced for a period of up to two years and longer where special conditions apply.

173. A police officer may make an application for a temporary order by telephone, facsimile, radio or other means.

### Weapons

174. Domestic violence orders automatically prohibit the respondent from possessing a weapon, unless the court otherwise orders. The court must revoke all weapons licences in the name of or in relation to the respondent for the duration of the order.

### Breach of an order

175. A person who knowingly contravenes a domestic violence order commits an offence and is liable to a maximum penalty of 40 penalty units or imprisonment for one year.

176. Police are enabled to arrest on any breach of the order, without having to warn that the respondent is in breach of the order.

### Additional provisions

177. Queensland has quite extensive provisions relating to police functions and powers. Where a police officer has reasonable grounds for suspecting that an act of domestic violence has been committed and that there is a danger of personal injury or property damage, a police officer can take the respondent into custody and enter the premises to ensure that an imminent danger of domestic violence does not exist.

### Future directions

178. Under a project initiated by the Queensland Domestic Violence Council and following community consultation, research is being undertaken into appropriate legislative responses to non-spousal domestic violence. Currently the Domestic Violence (Family Protection) Act 1989 only applies to married and de facto heterosexual couples (whether living together or separately) and the biological parents of a child or children.

## South Australia

179. South Australia has two pieces of legislation under which restraining orders can be made, the Domestic Violence Act 1994 and amendments to the Summary Procedure Act 1923, which is of general application.

### Applicability

180. The Domestic Violence Act 1994 applies to "family members", who in relation to a defendant are:

A present or former spouse or de facto spouse;

A child of whom a spouse or former spouse has custody; or

A child who normally or regularly resides with a spouse or former spouse.

### Criteria

181. The grounds for making an order under the Domestic Violence Act 1994 are:

Where there is a reasonable apprehension that the defendant may, unless restrained, commit domestic violence; and

The court is satisfied that the making of the order is appropriate in the circumstances.

182. A person commits domestic violence if he or she does various things, ranging from causing personal injury to a family member, to keeping a family member under surveillance on two or more occasions so as to reasonably arouse the family member's apprehension or fear. The grounds for making a restraining order under the Summary Procedure Act 1923 are that a person has

a reasonable apprehension that the defendant may, unless restrained, cause personal injury or damage to property or behave in an intimidating or offensive manner.

### Orders

183. The need to ensure that family members are protected from domestic violence is the primary consideration when the court makes an order.

184. There is no specified limit for the duration of the order.

185. An interim order may be made in the absence of the defendant, and telephone applications may be made by police officers.

### Weapons

186. Where the Court makes a final restraining order, it must order that any firearm possessed by the defendant be confiscated and that any firearm licence or permit of the defendant be cancelled.

### Breach of an order

187. A person who contravenes an order is guilty of an offence and is subject to a maximum of two years' imprisonment or a fine of up to $8,000.

### Additional provisions

188. The Domestic Violence Act 1994 provides that the court must, as far as practicable, deal with proceedings for restraining order applications as a matter of priority.

## Tasmania

### Eligibility

189. Tasmanian legislation is general. Any person may initiate proceedings for a restraining order.

190. In Tasmania, the Justices Act 1959 was amended in 1985 to provide for the issue of domestic restraint orders. These are designed as an adjunct to the existing criminal law and to provide immediate protection for persons suffering domestic violence. The Act has been amended a number of times since 1985 to improve the protection provided by restraint orders, to clarify and strengthen police powers of intervention in domestic violence situations and to simplify restraint order application procedures.

191: The Justices Act 1959 also contains provisions to revoke gun licences in restraint order proceedings involving violence and to prohibit persons subjected to restraint orders from obtaining gun licences.

## Victoria

### Eligibility

192. In cases of family violence, an intervention order may be sought under the Crimes (Family Violence) Act 1987 for the protection of "family members" which includes a present or former spouse or de facto spouse, a child who resides with the defendant or of whom the defendant is guardian, a person who is or has been a relative of the defendant, including close relatives to nephews, nieces and cousins, and a member of the same household of the defendant. The Act now covers persons who have had an intimate personal relationship and are living apart.

### Criteria

193. Intervention orders are intended to complement rather than replace existing criminal law remedies. An intervention order is a civil remedy in the nature of an injunction designed to provide ongoing protection for a victim of violence in the home. The court may make an intervention order if it is satisfied that a person has:

> Assaulted a family member or caused damage to property of a family member and is likely to do so again; or
>
> Threatened to assault a family member or cause damage to property of a family member and is likely to do so again; or
>
> Harassed or molested a family member and is likely to do so again.

194. The Crimes (Amendment) Act 1994 introduced a new offence of stalking. This offence offers protection to people who have been followed, placed under surveillance, contacted or sent offensive items where the offender intends to and does actually cause the person physical or mental harm or arouse apprehension or fear for the person's or another person's safety. A court is empowered to make an intervention order to prevent the continuation or recurrence of stalking in certain situations.

### Orders

195. The court may make an order imposing such restraints upon the defendant as appear necessary or desirable in the circumstances to the court. Specific prohibitions may be imposed including a direction for counselling and an exclusion of the defendant from specified premises.

196. The paramount consideration of the court when making an exclusion order is the need to ensure that the aggrieved family member is protected from violence.

197. An order remains in force for the period specified and as a result of 1995 amendments, there is now no limitation on the length of orders that can be made.

198. An interim order may be made in the absence of the defendant until the time specified or until further order of the court.

199. A police officer may make a complaint for an interim order by telephone or facsimile.

Weapons

200. A court may revoke any licence or permit to possess firearms, disqualify the defendant from obtaining any such licence or permit for up to 12 months and direct the forfeiture or disposal of firearms held by the defendant. Police also have the power to seize any firearm which they are aware is in the possession of the defendant.

Breach of an order

201. Contravention of an order is an offence. Amendments in 1995 increased the penalties imposed to a maximum of 240 penalty units or imprisonment for up to two years. If the penalty is for a second or subsequent offence the maximum imprisonment is five years.

## Western Australia

### Eligibility

202. The Justices Act 1902 generally provides for the protection of anyone who feels threatened. A complaint may be made by a police officer or a person against whom, or against whose property, the behaviour complained of is directed.

### Criteria

203. The court must be satisfied that the defendant has caused or threatened to cause personal injury or damage to property and is likely to again cause injury or damage or to carry out the threat, or that the defendant has behaved in a provocative or offensive manner that is likely to lead to a breach of the peace and is likely to again behave in a similar manner.

### Orders

204. The court may make an order imposing such restraints upon the defendant as are necessary or desirable to prevent him or her from acting in the apprehended manner. An order remains in force for a period of one year or as provided by the order, or until revoked. An interim order may be made in the absence of the defendant, following which the defendant must be summoned to appear in court.

205. There are currently no provisions regarding telephone orders.

### Weapons

206. The restraining order provisions of the Act do not include provisions specifically referring to firearms or other weapons.

### Breach of an order

207. A person who contravenes or fails to comply with an order commits an offence. Amendments that came into effect on 20 January 1995 increased the penalties to a maximum of $6,000 fine or a maximum of 18 months' imprisonment.

208. A new offence of stalking was created in 1994 by amending the Criminal Code, with a maximum penalty of three years' imprisonment or eight years for an aggravated stalking offence while armed or in breach of a restraining order.

### Future directions

209. Following the recent amendment of the Family Law Act 1975 to provide increased protection to women by enabling magistrates to vary or override family court orders where there has been a history of domestic violence, the Western Australian Government will be introducing complementary legislation during 1996.

210. A comprehensive review of restraining orders was completed in July 1995. The review recommended a number of legislative amendments and procedural changes to improve the effectiveness of restraining orders in providing protection to victims of domestic violence. These include a separate category of restraining order (the protection order) relating to violence and the removal of firearms when a protection order is made. These amendments are expected to be introduced in parliament during 1996.

211. As part of the review, a meeting of Aboriginal women from around the state was held. While protection of the victim was a key priority, family rehabilitation was strongly advocated. There was great concern that the incarceration of abusers should not be seen as a solution, given the chronic over-representation of Aboriginal people in jail and the expressed desire to hold families together.

212. The Western Australian Government launched its Family and Domestic Violence Action Plan in November 1995. It highlights the government's commitment to:

Maintaining and improving services and support to victims;

Assisting perpetrators to deal constructively with their behaviour to bring about positive change;

Providing services and support to all parties to reduce the recurrence of family and domestic violence; and

Enlisting the support of people in the community to convey the message that violence is not acceptable.

"Half way to equal" report

213. On 25 May 1989 at the request of the then Attorney-General, the House of Representatives Standing Committee on Legal and Constitutional Affairs commenced its inquiry into equal opportunity and equal status for women in Australia.

214. The Committee's report, entitled "Half way to equal", was released on 30 April 1992. The Committee made a substantial number of recommendations, including suggestions for strengthening the Sex Discrimination Act 1984 and for improving the functioning of the Sex Discrimination Commissioner and the Human Rights and Equal Opportunity Commission.

215. A response to "Half way to equal" was tabled in the Federal Parliament in December 1992. The Sex Discrimination Act 1984 and amendments to that Act are discussed further under article 26, below.

Equality before the law

216. In February 1993, the then Attorney-General asked the Australian Law Reform Commission (ALRC) to report on ways of ensuring equality before the law for women. A discussion paper, entitled "Equality before the law", was issued in July 1993 and the Commission's interim report, entitled "Equality before the law - women's access to the legal system", was released on 3 March 1994.

217. In July 1994, the ALRC presented the first part of its final report, "Equality before the law: justice for women" (Report No 69, Part 1). This part suggests amendments to the existing legal system and recommends strengthening the Federal Sex Discrimination Act 1984 and improving women's access to justice. The second and concluding part of the report was released by the Attorney-General in January 1995. It discusses the meaning of equality and gender bias in the law; recommends an Equality Act to give parliaments, governments and courts guidance on community expectations of law; and makes recommendations to promote ways to enable women's needs and experiences to be addressed in courts and tribunals. Educating the judiciary in relation to gender issues is discussed under article 14, below.

218. Over the past few years there has been significant decentralization in the industrial relations system in Australia through the movement to workplace or enterprise bargaining. In 1993 the Federal Government amended the Industrial Relations Act 1988, with a view to building safeguards into the Federal bargaining system to ensure that bargaining is accessible and fair for all workers, including women. The safeguards include minimum entitlements legislation which gives effect to a number of ILO and United Nations conventions on employment entitlements covering minimum wages, equal remuneration for work of equal value, termination of employment (including protection against unfair dismissal) and 12 months' unpaid parental leave.

219. With these protections in place, enterprise bargaining potentially offers a number of new opportunities for women. Experience to date suggests that more flexible leave and working time arrangements are an increasingly important element of agreements assisting workers with family responsibilities.

220. Working women's centres operate in New South Wales, the Northern Territory, Queensland, South Australia and Tasmania. Additional funding has been provided to the South Australian Working Women's Centre to assist with employing an Aboriginal liaison officer and establishing a toll free telephone number.

221. The centres provide free confidential information and advice to women, particularly women from non-English speaking backgrounds, Aboriginal and Torres Strait Islander women, women in rural and remote areas and non-unionized women.

Other treaty obligations

222. Australia is also a party to a number of international instruments which deal, inter alia, with discrimination against women. These include:

The Convention on the Elimination of All Forms of Discrimination against Women;

The International Covenant on Economic, Social and Cultural Rights;

The Convention on the Political Rights of Women;

The Convention on the Rights of the Child; and

A number of ILO Conventions including, in particular,
Convention No. 111 - Discrimination (Employment and Occupation) and
Convention No. 156 - Workers with Family Responsibilities.

223. Australia ratified the Convention on the Elimination of All Forms of Discrimination against Women in 1983 after detailed discussions with state and territory governments in the forum of the Meeting of Ministers on Human Rights. Australia has made two reservations to the Convention: one relates to the employment of women in the Defence Force in combat and combat-related duties (see Women in the defence force, above) and one to the provision of paid maternity leave.

224. International Labour Organization Convention No. 111 is attached as a schedule to the Human Rights and the Equal Opportunity Commission Act 1986. It is therefore one of the international instruments in respect of which the Human Rights and the Equal Opportunity Commission has jurisdiction. The Federal Industrial Relations Act 1988 in part implements the convention. The associated ILO Recommendation to Convention 111 and Regulation 111 is attached as schedule 9 to that Act.

225. In March 1990, Australia ratified International Labour Organization Convention No. 156, Concerning Equal Opportunities and Equal Treatment for Men and Women Workers: Workers with Family Responsibilities, and it came into effect in March 1991. Ratification obliges Australia to make it an aim of national policy to enable persons with family responsibilities who are engaged in, or wish to engage in, employment, to exercise their right to do so without being subject to discrimination and, to the extent possible, without conflict between their work and family responsibilities.

226. Prior to ratification, Australia already had a number of measures in place which were consistent with the principles underlying ILO Convention No. 156. In 1992, the Sex Discrimination Act 1984 was amended to proscribe dismissal from employment on the ground of family responsibilities. To facilitate public access to the document, ILO Convention No. 156 is also scheduled to the Industrial Relations Act 1988.

## Article 4

227. Since ratification of the Covenant, no emergencies of the type described in article 4 have occurred in Australia. Consequently, there has been no need to consider derogation from the provisions of the Covenant. Natural disasters (particularly floods) have been the subject of declarations, but these are for the purpose of enabling assistance, including financial assistance, to be given to alleviate the effects of the natural occurrence.

228. Australia has no general legislation authorizing either the federal or state governments to take extreme measures, such as superseding the civil power, in times of natural or other emergencies. There are, however, a number of constitutional provisions and pieces of federal and state legislation which enable emergency measures to be taken to control public harm. These are described below.

### Constitutional framework

229. Three provisions of the Australian Constitution provide a general framework within which laws may be passed or action taken by the Federal Government in emergency situations. The first of these is section 51 (vi), which provides that the Federal Parliament has legislative power in relation to the defence of the Commonwealth and states and the control of the defence forces. The relevant part of the section reads as follows:

> "The Parliament shall, subject to this Constitution, have power to make laws for the peace, order and good government of the Commonwealth with respect to:
>
> ... The naval and military defence of the Commonwealth and of the several States, and the control of the forces to execute and maintain the laws of the Commonwealth."

230. Only the Federal Government has the power to establish armed forces. Section 114 of the Constitution provides:

> "A State shall not, without the consent of the Parliament of the Commonwealth, raise or maintain any naval or military force."

231. No such consent has been given. In time of armed conflict, national defence has always been the Federal Government's responsibility, using the Australian Defence Force. For other emergencies, such as natural disasters, state legislation exists to provide for necessary emergency powers. This is detailed below.

232. The second relevant constitutional provision is section 61. Under this section, the executive is granted the power to execute and maintain all federal laws, including defence related laws. It provides that:

> "The executive power of the Commonwealth is vested in the Queen and is exercisable by the Governor-General as the Queen's representative, and extends to the execution and maintenance of this Constitution, and of the laws of the Commonwealth."

233. Finally, the Federal Government is mandated with protection of each state and granted conditional jurisdiction over internal strife in section 119 of the Constitution:

> "The Commonwealth shall protect every State against invasion and, on the application of the Executive Government of the State, against domestic violence."

234. These provisions enable the Federal Government to deal with emergency situations which may affect its own areas of responsibility, including maintenance of federal laws, as well as power to maintain and control forces for the defence of Australia and each state within Australia.

### Types of emergencies

235. In the discussion of federal and state legislation which follows, relevant legislation and powers are ordered by reference to the types of emergencies which have arisen, namely, wartime, civil disorder, strikes in essential services and natural disasters. Federal legislation is considered first, followed by state legislation where relevant.

#### Wartime

236. As mentioned above, the right to raise or maintain a naval or military force for use in wartime (or the threat or aftermath of war) is the prerogative of the Federal Government. In Australia's history, there has been extensive use made of the Constitutional authority permitting legislation for the defence of Australia.

237. Importantly, however, the High Court of Australia has made it clear that even in time of war this provision does not empower the Federal Government to enact legislation contrary to the other provisions of the

Constitution. This means that, for example, defence related legislation may not override section 116 which prohibits the Federal Government from interfering with religious freedom. Similarly legislation that restricts civil rights is prohibited unless that legislation is genuinely incidental or conducive to the prosecution of the war.

238. There has been no legislation based on the second part of section 51 (vi), the part which permits the use of the Defence Force to execute and maintain the laws of the Commonwealth.

239. The view of the Australian Government is that any legislation in breach of the provisions of the International Covenant on Civil and Political Rights, particularly article 4, would be held by the High Court of Australia to be unconstitutional.

### Civil disorder

240. Procedures for authorizing the use of the Defence Force in response to an application by a state for protection against civil disorder under section 119 of the Constitution are contained in the Defence Act 1903. The relevant section provides:

> "Where the Governor of a State has proclaimed that domestic violence exists therein, the Governor-General, upon the application of the Executive Government of the State, may, by proclamation, declare that domestic violence exists in that State, and may call out the Permanent Forces (other than Reserve Forces) and in the event of their numbers being insufficient may also call out such of the Reserve Forces and the Citizen Forces as may be necessary for the protection of that State, and the services of the Forces so called out may be utilized accordingly for the protection of that State against domestic violence:
>
> > Provided always that the Reserve Forces or the Citizen Forces shall not be called out or utilized in connection with an industrial dispute."

241. This provision is supplemented by Australian military regulations and air force regulations. Notwithstanding the above provision, there has never been a call out of the Defence Force instigated by a state.

242. As discussed above, it is also constitutional for the Defence Force to be employed for the protection of Commonwealth interests when civil resources are insufficient. There is no legislative requirement for call-out by the Governor-General in such a situation. Under the common law, however, call-out by the Governor-General on the advice of a minister is possible if the police force is unable to resolve a situation and federal interests are involved. One example might be a major terrorist incident involving a breach of federal law. There have been only two occasions of call-out for the protection of Commonwealth interests: once in February 1978 to protect a Commonwealth Heads of Government Meeting and once in Papua New Guinea before independence to protect people and property in the face of rioting.

243. The use of the defence force in aid of civil authorities is only justified in the most exceptional circumstances and must be in accordance with the basic principle that the civil law is supreme. The defence force is called out only to assist the civil law enforcement authorities in the restoration and maintenance of law and order and the protection of persons and property. Members of the defence force have only ordinary civilian powers, i.e. less than those of members of the police force.

## Northern Territory

244. The Criminal Code of the Northern Territory deals with offences against public order, such as sedition, terrorism, offences against the executive and legislative power, and unlawful assemblies and breaches of the peace. It is an offence to engage in or undertake a seditious enterprise and also to write, print, utter or publish seditious words. Membership of an unlawful organization is also a crime. "Unlawful organization" means an organization that uses, threatens to use or advocates the use of unlawful violence in the Territory to achieve its end.

245. In the Northern Territory, it is an offence to interfere with the free exercise by a minister of the Crown of a duty of office. Likewise it is a crime to influence by force, deception, threat or intimidation a member of the Legislative Assembly, or to bribe such a person. It is an offence under the Criminal Code to take part in an unlawful assembly or a riot. The Criminal Code also details the duty of a police officer to disperse persons who are "riotously assembled together". Any person who does not disperse after the making of a proclamation by a police officer is guilty of a crime.

## Queensland

246. In Queensland, the State Emergency Service is responsible for the coordination of voluntary disaster relief efforts and public education to counter disaster. In relation to civil disorder, however, the State Counter Disaster Organisation Act 1975 specifically forbids the State Emergency Service:

> Actual combat against an enemy; and
>
> The putting down of a riot or other civil disturbance.

## Victoria

247. The Victorian Public Safety Preservation Act 1958 provides for the Governor in Council to declare a state of emergency where any action has been taken or is immediately threatened which is a danger to or is likely to threaten public safety or order. Parliament will be recalled, at which time both houses will resolve whether to continue the state of emergency proclaimed by the Governor in Council. The Victorian Summary Offences Act 1966 proscribes riotous, indecent or offensive behaviour and the use of profane, indecent or obscene language by persons in or near a public place. The Crimes Act 1958 proscribes the crime of treason.

## Strikes in essential services

248. The Federal Crimes Act 1914 makes it an offence for a person to take part in or continue, or incite to, urge, aid or encourage the taking part in, or continuance of a lockout or strike if the Governor-General has made a proclamation that there exists a serious industrial disturbance prejudicing or threatening trade or commerce with other countries or among the states. The Act also makes it an offence to obstruct or hinder the performance of public services provided by the Federal Government.

249. A number of states have legislation to deal with strikes in essential services, for example, in electricity or water supplies or in prisons. Such legislation generally provides a specified minister or government official with the capacity to issue directions to facilitate resumption of the service. Such capacity is usually strictly limited in scope and duration.

### New South Wales

250. The New South Wales Essential Services Act 1988 is concerned with the introduction of emergency measures and procedures in situations where the operation of essential services is disrupted. The main features of the Act are:

The issue by the Governor of a proclamation or state of emergency order in relation to a disruption in the provision of an essential service;

The making of regulations or the issue of directions by the relevant minister whereby emergency powers are invoked to control, direct, restrict or prohibit the supply or operation of an essential service;

The prompt referral of an industrial dispute in connection with an essential service to the Industrial Commission of New South Wales;

The introduction of a range of sanctions to ensure compliance with any emergency measures.

251. The New South Wales State Emergency and Resource Management Act 1989 enables an emergency to be declared when an actual or imminent occurrence such as fire, flood or earthquake endangers safety or health or destroys property and requires a significant and coordinated response. The time of operation of declarations has to be specified and is subject to limits set out in the Act. The authorities may requisition property and require people to leave particular premises or to leave or stay outside the general area.

### Northern Territory

252. The Essential Goods and Services Act 1981 is an act to control and manage prescribed goods or services during periods of shortage. Pursuant to the Act, the Chief Minister may, by a notice in the Gazette, declare that a shortage exists in relation to certain goods or services. Where a declaration is in force, the minister administering the Act may take such

action as is necessary to ensure that the goods or services are available for use, and are used in a manner that is calculated by him to serve the interests of the community.

253. Further details on essential services legislation is provided under articles 8 and 22, below.

Queensland

254. There is no longer any legislation in Queensland which directly relates to strikes in essential services. Legislation enacted in Queensland (the Electricity (Continuity of Supply) Act 1985), following a strike among electricity supply workers in the south-east of that state, was repealed as of 23 June 1990.

255. The Queensland State Emergency Service is prohibited from bringing to an end a strike or lockout under the provisions of the State Counter Disaster Organisation Act 1975.

256. On the other hand, the State Transport Acts 1938-1981 provide emergency powers to the government which are very general and have been used on occasions to declare a state of emergency in the event of a strike in an essential service industry. These provisions have not been used in the current reporting period.

South Australia

257. The Essential Services Act 1981 of South Australia provides that the Governor may, by proclamation, declare a period extending for not more than seven days to be a period of emergency. During the period of emergency the Minister may give directions in relation to the use of proclaimed essential services.

Victoria

258. In Victoria, the Essential Services Act 1958 provides for the Governor in Council to proclaim that a state of emergency exists in relation to an essential service defined in the Act. The proclamation must be published in the Government Gazette and is valid for one month.

259. The Fuel Emergency Act 1977 provides for the Governor in Council, by proclamation published in the Government Gazette, to declare that a state of emergency exists in relation to fuel. The proclamation is valid for sev days.

260. The Emergency Management Act 1986 provides for the coordination, organization and management of resources to deal with emergencies. The Victorian State Emergency Service, constituted under the Victorian State Emergency Act 1987, has responsibility for emergency management and emergency operations. The Vital State Industries (Works and Services) Act 1992 makes it an offence to interfere or attempt to interfere with a vital industry, which is defined in the Act. The Governor in Council, by order published in

the Government Gazette, can declare an activity, undertaking, project, work or service to be a vital industry. The proclamation is valid for three weeks from publication, unless revoked earlier.

### Western Australia

261. In Western Australia, the Fuel, Energy and Power Resources Act 1972 makes provision for the conservation and utilization of the present and future sources and supplies of fuel, energy and power in Western Australia. A state of emergency may be declared by the Governor to exist either in the whole state or in any part of the state specified in the declaration.

### Natural disasters

262. There is legislation in most states to deal with general states of emergency resulting from fire, flood, storm and other natural causes. This legislation authorizes the executive to take action to restore services, but in no case can there be a suspension of the ordinary law. The action possible under the legislation is of a facilitative kind.

263. The Defence Force is available for support in cases where the state authorities are unable to cope with a natural disaster or civil emergency. There is no legislation governing this assistance, but detailed administrative instructions exist which regulate its use. Assistance of this type has been given several times since 1986, notably in relation to flood relief and bushfire control.

### Northern Territory

264. The Disasters Act 1982 provides for the adoption of measures necessary for the protection of life and property from the effects of disasters and emergencies. The Act defines "disaster" to mean an occurrence which causes or threatens to cause loss or injury to persons or property or which in any way endangers the safety of the public and in respect of which the resources of a normal government service are inadequate to provide appropriate counter-disaster measures. "Disaster" includes hostilities and acts of violence or intimidation as well as natural disasters such as cyclones.

265. Section 35 of the Disasters Act 1982 empowers the Administrator to declare a state of disaster. Section 37 lists special powers available during a state of disaster. They include requisition of personal property, closure of premises, evacuation of people and powers of entry for certain purposes.

266. Pursuant to section 39 of the Act the Minister administering the Act may declare a state of emergency. A declaration of a state of emergency continues in force for two days unless revoked sooner or superseded by a declaration of a state of disaster.

267. The Disasters Act 1982 established a Counter-Disaster Council and provides that the Territory counter-disaster controller is the Commissioner of Police. It also provides for the establishment of the Northern Territory Emergency Service and the appointment of a director of that Service. The

powers available during a state of disaster or a state of emergency are exercisable by the Northern Territory Emergency Service, members of the Police Force and persons appointed by regional counter-disaster committees.

## Queensland

268. Under the Queensland State Transport Act 1938, it is possible for the Governor in Council to declare a state of emergency for a period not exceeding three months where the peace, welfare, order, good government or public safety of the state or part of it is likely to be imperilled by fire, flood or storm, tempest, act of God or by reason of any other cause or circumstance. Once this declaration is made provision can be made for the supply of food and other essential services to cope with the emergency.

269. The State Counter Disaster Organisation Act 1975 provides for two organizations to be involved with disaster management:

- The State Counter Disaster Organization, which is responsible for the coordination of resources and to ensure that all steps are taken to plan for and counter the effects of a disaster; and

- The State Emergency Service, which is responsible for the coordination of voluntary efforts within the community and public counter-disaster education.

## South Australia

270. The State Disaster Act 1980 makes provision for the protection of life and property in the event of a disaster. The Act gives authority:

For a State Disaster Committee to prepare a state disaster plan and to maintain contact with and monitor the operating procedures of organizations which the State Disaster Plan envisages will participate in counter-disaster operations;

For the Commissioner of Police to take charge of counter-disaster operations as the state coordinator;

For declarations that a state of disaster exists to be made by the Governor (for a maximum of 96 hours subject to extension by a resolution of parliament) or by the relevant minister (for a maximum 12 hours); and

For post-disaster operations to be supported by government resources.

271. The operational provisions in the above legislation have not been invoked since February 1983.

272. The South Australian Metropolitan Fire Service Act 1936, the Country Fires Act 1989 and the State Emergency Service Act 1987 regulate and administer the relevant organizations and provide the necessary authority for them to work at emergency scenes, such as fires.

### Tasmania

273. In Tasmania, the Emergency Services Act 1976 provides for the declaration of states of disaster, emergency or alert. A disaster is identified as any occurrence including an attack against Tasmania that causes or threatens to cause loss of life or property, injury to persons or property or distress to persons, or in any way endangers the safety of the public. An emergency is defined as any situation in which a disaster appears likely to occur.

274. Declarations are strictly limited in scope and duration, giving specific powers to authorized personnel, including the removal of persons or vehicles from any area, the power to enter premises, the commandeering of resources for the purpose of dealing with the emergency and the closure of roads.

## Article 5

275. In ratifying the Covenant, Australia accepted the obligations contained in paragraphs 1 and 2 of article 5. Australia is committed to the continued observance of the civil and political rights contained in the Covenant. Furthermore, as the content of this report demonstrates, the Australian Government does not interpret any provision of the Covenant as implying any right to derogate from the rights and freedoms recognized in the Covenant beyond those limitations that are expressly declared in the Covenant itself.

276. The Australian Government has not considered it necessary to enact legislation aimed specifically at groups or individuals who might undertake destructive and restrictive action against the rights and freedoms recognized in the Covenant. The Australian Government considers that the sanctions for the breaches of domestic law and the special human rights machinery (discussed in the core document and in Part I) provide an adequate safeguard, having regard to Australia's domestic situation, against this sort of activity. As mentioned in the comments on articles 19 and 20, Australia, as a democratic society, encourages the free exchange and expression of ideas and recognizes the existence of conflicts of ideas. It would not, therefore, consider the mere exchange and expression of ideas as activity in breach of the provisions of this article. In this regard, the attention of the Committee is also drawn to the commentary in this report on Australia's reservation to article 20 of the Covenant.

## Article 6

### Capital Punishment

277. As discussed in Australia's second report, the death penalty has been abolished in Australia by the following legislation:

| | |
|---|---|
| Federal: | Death Penalty Abolition Act 1973 |

| | |
|---|---|
| New South Wales: | Crimes (Amendment) Act 1955<br>Crimes (Death Penalty Abolition) Amendment Act 1985<br>Miscellaneous Acts (Death Penalty Abolition) Amendment Act 1985 |
| Queensland: | Criminal Code Amendment Act 1922 |
| South Australia: | Statutes Amendment (Capital Punishment Abolition) Act 1976 |
| Tasmania: | Criminal Code Act 1968 |
| Victoria: | Crimes (Capital Offences) Act 1975 |
| Western Australia: | Acts Amendment (Abolition of Capital Punishment) Act 1984 |

The Federal Act applies in both the Australian Capital Territory and in the Northern Territory.

Genocide and war crimes

278. Australia became a party to the Convention on the Prevention and Punishment of the Crime of Genocide in July 1949. Although the Genocide Convention Act 1949 approves Australian ratification of the Genocide Convention, there is no specific legislation creating the crime of genocide. The approach until now has been that the common law and the criminal codes of the states have provided adequate punishment for acts prohibited by the Genocide Convention. So, for example, a deprivation of life constituting genocide is punishable as murder (or wilful murder) in all jurisdictions.

279. The War Crimes Act 1945 provides for the prosecution in Australia of persons accused of acts of genocide in Europe during the Second World War. The language of section 7 (3) (ii) of the Act, which defines war crimes, is taken directly from article II of the Convention on the Prevention and Punishment of the Crime of Genocide.

280. The International Law Commission (ILC) was given a mandate by the United Nations General Assembly in 1992 to prepare a draft statute for an international criminal court as a matter of priority. Australia strongly supported this mandate being given to the ILC. The ILC completed its work on the draft statute in 1994. Genocide is among the offences included within the jurisdiction of the court under the draft statute.

281. At its forty-ninth session the General Assembly adopted a resolution concerning the draft statute in which it established an ad hoc committee open to all United Nations Members to review the major substantive and administrative issues arising out of the draft statute and, in the light of such review, to consider arrangements for the convening of an international conference of plenipotentiaries. The committee was required to report to the

General Assembly at its fiftieth session. The committee held meetings in New York in April and August 1995 in which Australia was an active participant.

282. Australia has enacted the International War Crimes Tribunals Act 1995 and International War Crimes Tribunals (Consequential Amendments) Act 1995 enabling Australia to assist and comply with requests from two international tribunals established by the United Nations Security Council. The two tribunals have the power to prosecute persons responsible for serious violations of international humanitarian law, including genocide, committed in the former Yugoslavia and Rwanda. Australia's role in the tribunals includes the appointment of an Australian, Sir Ninian Stephen, as a judge of the International Criminal Tribunal for the Former Yugoslavia, and another Australian, Mr Graham Blewitt, as the Deputy Prosecutor of that Tribunal.

### Right to life

283. The inherent right to life recognized in paragraph 1 of article 6 is protected by both the criminal and civil law throughout Australia.

### Criminal law

284. The criminal codes of Queensland, Tasmania, Western Australia and the Northern Territory embody the major aspects of the criminal law in those jurisdictions. In other jurisdictions the criminal law is embodied in both statute and the common law. A major review of the various criminal laws in Australia is currently being undertaken by the Model Criminal Code Officers' Committee (MCCOC). The Committee aims to develop a model criminal code for adoption in all jurisdictions. This uniform code will replace the common law and the existing codes and crimes acts in each jurisdiction.

### Unlawful killing

285. In all Australian jurisdictions it is an offence unlawfully to kill another person. Both the common law and the criminal codes provide for the offences of murder, manslaughter, attempted murder and, in some cases, threatening to commit murder.

286. Although the exact terminology varies across jurisdictions, in general a person commits the offence of murder if he or she kills another person:

With the intention to kill that person;

With the intention to cause grievous bodily harm to that person;

With the knowledge or foreseeability that an act is likely to cause death or grievous bodily harm to that person; or

In the commission of an act or serious offence other than the murder (for example, in New South Wales a crime that is punishable by 25 years or life in jail, whereas other states refer simply to an offence or an act which may endanger human life).

287. In all jurisdictions it is also an offence to attempt murder or to conspire, encourage or assist in a murder. Threatening to commit a murder constitutes a criminal offence under statute in some jurisdictions such as the Northern Territory, Queensland and Tasmania, and may be unlawful under the common law in some situations.

288. There may exist circumstances which negate culpability, thus providing a complete acquittal. These may include situations where the killing was committed:

- Without the requisite mental element (because the defendant was in a state of automatism, insane or below the age of criminal responsibility);
- Using such force as was reasonable in the circumstances to prevent the commission of a felony or in the exercise of a lawful power of arrest;
- Using such force as was reasonable in the circumstances in self-defence, defence of another or defence of property; or
- As a result of misadventure or misfortune (where the offender's conduct is without culpable negligence).

Manslaughter

289. In general, a person who unlawfully kills in circumstances other than those which constitute murder will be guilty of manslaughter. Some factors may exist which make the offender less culpable, and thus require a charge of either voluntary or involuntary manslaughter. Voluntary manslaughter will be relevant where elements such as provocation, diminished responsibility or infanticide exist. Involuntary manslaughter generally arises where the offender intended to inflict bodily harm only, acted with criminal negligence or performed a dangerous and unlawful act.

Compensation for criminal injuries

290. Compensation for criminal injuries is primarily a state responsibility. There is no national victim compensation scheme or counselling body in existence. The legislation and the bodies responsible for executing the state criminal compensation schemes are as follows:

Australian Capital Territory: Criminal Injuries Compensation Act 1983, administered by the Master of the Supreme Court;

New South Wales: Victims Compensation Act 1987, administered by the Victims Compensation Tribunal;

Northern Territory: Crimes (Victims Assistance) Act 1992, administered by the Local Court;

Queensland: Criminal Code Act 1899, administered by a court (or the Governor, who on application may make an ex gratia payment);

South Australia: Criminal Injuries Compensation Act 1978, administered by the District Court;

Tasmania: Criminal Injuries Compensation Act 1976, administered by the Master of the Supreme Court;

Victoria: Criminal Injuries Compensation Act 1983, administered by the Crimes Compensation Tribunal; and

Western Australia: Criminal Injuries Compensation Act 1985, administered by an assessor appointed for the purpose.

291. Where a person is convicted of an offence against a federal law, the Federal Crimes Act 1914 provides that the court may make an order for reparation. In other cases of need, the Federal Government would consider providing compensation to individuals. The Australian Capital Territory compensation scheme applies to offences against federal laws committed in the Territory.

292. The Australian external territories, the Territories of Christmas Island and Cocos (Keeling) Islands, also provide for a system of compensation for criminal injury. In Norfolk Island, a court may, in addition to any penalty imposed on a convicted person, order the offender to make reparation to a person, by way of money payment or otherwise, in respect of a loss suffered by the person as a direct result of the offence.

293. In June 1993, a set of principles, based on the Declaration of Basic Principles of Justice for Victims of Crime and Abuse of Power, were adopted by the Standing Committee of Attorneys-General as a guide for the treatment of victims of crime. Principle 10 provides for an entitlement for victims of crimes involving sexual or other personal violence to have recourse to a criminal injuries compensation scheme provided by the state, where compensation is not available from the offender. It was agreed that the principles would be adopted by all jurisdictions and each state would have responsibility for their implementation. The principles were viewed as a basis for building a uniform system of recognition of victims' rights and the provision of victim support services throughout Australia. The principles are as follows:

Victims of crime should be treated with courtesy, compassion and respect for their dignity;

Victims of crime and their families should have access to welfare, health, counselling, medical and legal assistance responsive to their needs;

Inconvenience to victims of crime should be minimized and their privacy protected;

A victim of crime should be afforded all necessary protection from violence and intimidation by the accused;

Victims of crime, who so request, should be kept informed about the progress of the investigation of the crime and the prosecution of the offence;

The views and concerns of victims should be considered at all appropriate stages of the investigation and prosecution of the offence;

A victim of crime who is a witness in the trial should be informed about the trial process and the role of the victim as a witness in the prosecution of the offence;

The effects of the crime upon the victim should be placed before the court, particularly where the offence involves sexual or other personal violence;

Victims of crime, who so request, should be kept informed about the disposition of the offender; and

Where compensation is not available from the offender, the victim of a crime involving sexual or other personal violence should have recourse to a criminal injuries compensation scheme provided by the state.

### Acts of terrorism

294. A number of federal Acts contain provisions to safeguard against acts of terrorism under Australia's obligation as a party to international conventions.

295. The Crimes (Internationally Protected Persons) Act 1976 gives effect to the Convention on the Prevention and Punishment of Crimes Against Internationally Protected Persons, Including Diplomatic Agents. Section 8 of the Act creates a series of offences against internationally protected persons, which include murder, kidnapping and attacks upon their person or liberty. An "internationally protected person" is defined in the Act and includes visiting prime ministers, presidents and diplomats.

296. The Crimes (Aviation) Act 1991 gives effect to the Convention for the Suppression of Unlawful Seizure of Aircraft, the Convention for the Suppression of Unlawful Acts Against the Safety of Civil Aviation, and its Supplementary Protocol for the Suppression of Unlawful Acts of Violence at Airports serving International Civil Aviation and the Convention on Offences and Certain Other Acts Committed on Board Aircraft. Part II of the Act creates a series of offences, including offences relating to hijacking and acts of violence on board aircraft, offences affecting aircraft and the safe operation of aircraft (including the destruction of aircraft with the intent to kill), offences relating to the safety of civil aviation and acts of violence at certain airports, and offences relating to federal aerodromes and air navigation facilities (which include endangering the safety of aerodromes). Part III of the Act deals with restoring control of aircraft and dealing with offenders.

297. The Crimes (Hostages) Act 1989 gives effect to the International Convention Against the Taking of Hostages. Section 7 details the meaning of hostage-taking, (which includes threatening to kill or injure a hostage), and section 8 specifies when hostage-taking is an offence.

298. The Crimes (Ships and Fixed Platforms) Act 1992 gives effect to the Convention for the Suppression of Unlawful Acts Against the Safety of Maritime Navigation, and the Protocol for the Suppression of Unlawful Acts Against the Safety of Fixed Platforms Located on the Continental Shelf. Division 1, Part II creates certain offences in relation to ships, including acts of violence and causing death, while Part III creates a similar range of offences in relation to fixed platforms.

299. Additionally, the Crimes (Biological Weapons) Act 1976 gives effect to the Convention on the Prohibition of the Development, Production and Stockpiling of Bacteriological (Biological) and Toxic Weapons and on their Destruction. Section 8 makes it an offence to develop, produce, stockpile or otherwise acquire or retain certain biological agents and toxins and biological weapons. The Nuclear Non-Proliferation (Safeguards) Act 1987 makes it an offence to steal nuclear material or to use it, or threaten to use it, to cause injury to people or damage to property.

300. The Crimes (Foreign Incursions and Recruitment) Act 1978 creates offences relating to incursions into foreign States for the purposes of engaging in hostile activities, and recruitment and preparations for such incursions (subject to a number of exceptions).

301. The Public Order (Protection of Persons and Property) Act 1971 creates offences relating to assemblies at certain premises involving violence or the apprehension of violence.

302. In addition, the Federal Government has strengthened Australia's counter-terrorist capacity through the Standing Advisory Committee on Protection Against Violence, which supplies additional training and equipment to the state police forces, and coordinates regular major counter-terrorist training exercises involving state and federal police, intelligence agencies and the defence forces.

303. The Federal Government has also improved protection for the diplomatic and consular community, by increasing funding - on a year-to-year basis - for the protection of diplomatic interests in response to threats as they arise.

Missing persons

304. Every year thousands of Australians go missing. In 1993-94, 26,345 people were reported missing. The investigation of missing persons is primarily a state responsibility and all state police services have dedicated missing persons components. The Australian Federal Police has responsibility for community policing in the Australian Capital Territory and also maintains a missing persons unit. Generally, reports of missing persons, depending on the circumstances of the reported disappearance, are either investigated by detectives as a criminal incident, or are investigated by the police officer receiving the report where no suspicious circumstances exist.

305. State governments and police forces have begun work to provide a more comprehensive means of listing and tracking people. The National Exchange of Police Information is developing a Persons of Interest database to be made available to all jurisdictions. "Missing persons" will be one subject of this database. Jurisdictions are urged to contribute to the database, which is a resource for the various police forces, a list containing sufficient details for identification.

## Abortion

306. In every Australian jurisdiction it is a criminal offence to effect or assist an abortion except under particular circumstances. The following provision, taken from the Victorian Crimes Act 1958, is typical of the prohibition on abortion:

> "Whosoever...with intent to procure the miscarriage of any woman whether she is or is not with child unlawfully administers to her or causes to be taken by her any poison or other noxious thing, or unlawfully uses any instrument or other means with the like intent, shall be guilty of an indictable offence, and shall be liable to level 6 imprisonment (i.e. 7.5 years)."

307. The Supreme Court of Victoria held, in R v. Davidson [1969] VLR 667, that the use of an instrument with intent to procure a miscarriage is unlawful on therapeutic grounds unless the accused honestly believes, on reasonable grounds, that the Act was:

> Necessary to preserve the woman from serious danger to her life, or to preserve her physical or mental health (not merely being the normal dangers of pregnancy and childbirth which the continuance of the pregnancy would entail); and
>
> In the circumstances, not out of proportion to the danger to be averted.

308. Similar reasoning was used in the judgement of the New South Wales District Court in R v. Wald (1971) 3 DCR 25. The judgements in R v. Davidson and R v. Wald were expressly followed and applied in Queensland in the case of R v. Bayliss and Cullen (1986) 9 QLR 8. Following these decisions the relevant legislation in New South Wales and Western Australia was amended.

309. In South Australia and the Northern Territory certain other conditions under which an abortion may be lawfully carried out are specified by legislation. These conditions include, in particular, the situation where there is a substantial risk that if the pregnancy were not terminated and a child were born to the pregnant woman, the child would suffer such physical or mental disabilities as to be seriously handicapped. In Western Australia abortions may only be carried out if necessary to preserve the mother's life. In Tasmania, abortion remains a crime under the Criminal Code 1924, unless it can be justified by an honest belief on reasonable grounds that the operation is necessary to preserve the mother from serious danger to her life, or

substantial risk of serious injury to her physical or mental health (not being the normal dangers of pregnancy and childbirth which the continuance of the pregnancy would entail).

Government programmes

310. In 1990, in response to Recommendation 103 of the National Committee on Violence (NCV), which reported in February 1990, the Federal Government established a national homicide monitoring programme in the Australian Institute of Criminology, to develop and maintain a standardized database on homicides across Australia. The Institute has produced three reports under this programme, analysing the years 1989-90, 1990-91 and 1991-92. The data is now widely used in policy-making directed at the prevention and control of unlawful homicides.

311. Following a shooting massacre at Strathfield in New South Wales in 1991, in which seven people were killed, the heads of federal and state governments agreed to the establishment of a Violence Prevention Unit in the Institute. The unit was subsequently subsumed into the Institute's Crime and Violence Prevention and Control Program.

312. One of the tasks of the Institute's violence prevention programme is the provision of practical assistance for the prevention or reduction of all forms of criminal violence. Another outcome of the Strathfield massacre, the Australian Violence Prevention Award, recognizes achievement in the field of violence prevention and also enables the Institute to monitor and advise on the effectiveness of projects or programmes dealing with violence.

Police use of firearms

313. Police officers are entitled to use reasonable force when making an arrest and may be justified in using a firearm in specific circumstances, such as self-defence, the defence of other persons threatened with serious violence and the apprehension of fugitives. Any police officer who discharges a firearm is required to furnish a report and improper use of such arms is investigated and sanctioned under criminal law.

314. In the period from the examination of the second report in 1988 to June 1995, a total of 39 people have been shot and killed by police in Australia: 18 in Victoria, 7 in New South Wales, 5 in Queensland, 3 in Western Australia, 2 in each of South Australia, Tasmania and the Northern Territory. The Australian Capital Territory reports no fatal shootings by police during the period.

315. The relatively high incidence of fatal shootings in Victoria has led to public criticism and a series of reviews of police use of and training in firearms and defensive tactics in that state. In Victoria, each individual shooting incident has been the subject of a detailed internal police review and it is standard procedure for an inquest to be held by the Coroner into any fatal shooting by police. The Victorian Deputy Ombudsman (Police Complaints) has also conducted inquiries where complaints have been made to his office. In addition, a number of broader reviews of police use of firearms and of the alternatives to using firearms have been or are being

conducted. These reviews include advice from the United States Federal Bureau of Investigation, the Royal Canadian Mounted Police, the Australian National Police Research Unit and the Australian Institute of Criminology. These reviews are being integrated through an Internal Firearms Review Project to determine whether current policies and practices are of a standard that is acceptable to the community and to ensure that appropriate action is taken if they are not.

316. Also in response to these shootings, Project Beacon has been established in Victoria to train police to resolve conflict.

## Civil (non-criminal) law

### Wrongful act causing death

317. A wrongful act or omission causing death can give rise to an action for damages in tort or form the grounds for an application for compensation under legislation in all Australian jurisdictions. If the death arose out of, or in the course of, the deceased's employment, compensation may be sought against the deceased's employer under the worker's compensation legislation in all jurisdictions.

318. If the death is caused by the wrongful act, neglect or default of another, irrespective of whether the act amounted in law to a crime, legislation throughout Australia allows the personal representative of the deceased to bring an action for damages for loss of economic or material advantage on behalf of those members of the deceased person's family who sustained damage by reason of the death. Additionally, all Australian jurisdictions provide that most causes of action survive for the benefit of the deceased's estate. These include any actions which the deceased would have had against the person responsible for inflicting the injuries of which he or she died.

### HIV/AIDS

319. In the HIV/AIDS area, the public consequences of private acts are an important concern of the law. Relationships in which transmission may occur range from intimate or personal relationships to service provision by health professionals and others.

320. A major aim of HIV/AIDS public health policy is to encourage people to take responsibility for their own health and to prevent themselves becoming infected. To some extent this runs contrary to the civil liability rules which seek to compensate people who are injured. Consequently Australia's public health response is built upon a consensual model, rather than detention and isolation, by involving the people affected and by providing education and prevention programmes to people at risk. In this way Australia seeks to balance the interest of public health and concern for civil liberty.

321. All Australian states have, or are in the process of reviewing, public health legislation to further facilitate the reduction and prevention of communicable diseases, particularly HIV/AIDS.

322. Of concern to Australian Governments has been the high prevalence of HIV/AIDS in Australian prisons. In 1992 the Legal Working Party of the Intergovernmental Committee on AIDS recommended that residents in correctional and other institutions have similar access as the rest of the community to therapeutic goods which prevent the transmission of HIV. At present this recommendation is only partially implemented. Only in the Australian Capital Territory do detainees have access to condoms. However a trial programme has been approved by Cabinet in New South Wales, and in Victoria dispensing machines are available at prisons where there are residential visiting facilities for prisoners and families. In most jurisdictions, bleach is issued, either specifically for cleaning needles and syringes or more generally, for any hygiene purpose. However, bleach is not available in Tasmanian nor Northern Territory prisons.

323. Second, the transmission of HIV through blood and blood products has been of concern in Australia as medical procedures were a source of HIV infection prior to 1985. However, the risk of acquiring HIV infection via transfusion of blood or blood products has essentially been eliminated by the introduction of universal blood and tissue screening in May 1985 and donor interview and deferral.

324. One particular concern was the spread of HIV/AIDS through blood transfusions, which resulted in actions for compensation against blood banks and may have jeopardized the continuation of such an important public service. With the introduction of donor deferral (based on interviewing donors about sexual and drug injection history and other factors) and heat treatment of Australian lyophilized concentrates in late 1984 and the universal screening of blood and tissue donation in 1985, the risk of acquiring HIV infection via these routes has virtually been eliminated.

325. Nevertheless, the possibility remains that a unit of HIV-infected blood may have been used for transfusion in Australia since 1985, as a result of a blood donation collected from a donor recently infected with HIV who had not formed detectable levels of HIV antibodies at the time of the relevant test. Although the cumulative likelihood of this increases with time, the chance that a unit of blood is contaminated with HIV remains extremely small and must be viewed in the broader context of the benefits provided by donated blood or tissue.

326. Retrospective legislation has been enacted in all jurisdictions, except Queensland, which relies on a Cabinet decision made in 1985 which limits liability for HIV transmission through the supply of blood or blood products by codifying procedures relating to donor declaration and screening procedures.

327. In May 1993, four surgical patients in New South Wales were found to have acquired HIV infection in the course of relatively minor out-patient surgery during 1989. The precise mode of transmission remains uncertain.

328. In response to this incident, the Federal Government established a joint working party of the Australian National Council on AIDS (ANCA) and the National Health and Medical Research Council (NHMRC) with the following terms of reference:

> To review the current NHMRC/ANCA "Management guidelines for the control of infectious disease hazards in health care establishments" and make recommendation for any changes or further guidelines for the control of infectious disease hazards in non-hospital settings. Regard should be had for any implications for infection control in the report of the incident of apparent patient transmission in New South Wales;
>
> To make specific recommendation for the implementation of, and for ensuring compliance with, infection control procedures in non-hospital settings; and
>
> To make recommendations on the investigating and reporting of episodes of the spread of communicable diseases in health care settings, including:
>
>> Developing national collaborative approaches to disease investigation considering underlying principles of epidemiological investigation and the roles and responsibilities of each of the parties;
>>
>> Ensuring that investigations performed are of the highest standards;
>>
>> Ensuring the interests of the parties are respected;
>>
>> Ensuring the primacy of the public health; and
>>
>> Ensuring that the results of the investigations are reported in a way appropriate for the information of the public and for disease control.

329. In July 1994 the working party released the guidelines "Infection control in office practice: medical, dental and allied health", which fulfilled their first term of reference - to review existing infection control guidelines and made recommendations for further guidelines for the control of infectious diseases in a non-hospital setting.

330. These guidelines are currently under review by NHMRC and a draft document, "Infection control in the health care setting", was released for public comment in September 1995. When finalized the document will be the national standard for infection control in the health care setting and will be in a form that can be legislatively adopted by state jurisdictions.

331. New South Wales has included a regulation-making power in the Health Legislation (Miscellaneous Amendment) Act 1994 to enable general codification of infection control guidelines. The Tasmanian HIV/AIDS Preventive Measures Act 1993 includes a requirement that medical practitioners, nurses and dentists follow current infection control guidelines issued by NHMRC and

ANCA. The Australian Capital Territory has enacted legislation (Skin Penetration Act 1994) which enables codes of practice to be determined by the Minister for Health.

332. The third relevant route of transmission is from a HIV-infected mother to her child. Since the beginning of the HIV/AIDS epidemic in this country, the diagnosis of HIV-infection in 39 children (as at 31 December 1994) was attributed to the exposure category of mother with/at risk for HIV infection.

333. Over the past few years, information has emerged that can be used to substantially reduce the chance that a baby born to a woman with HIV infection will acquire the virus. The most important interventions are avoidance of breastfeeding, use of zidovudine (AZT) during late pregnancy and choice of Caesarean rather than vaginal delivery. Although there is no single study that has evaluated the collective impact of these interventions, it is plausible that a reduction in the rate of transmission from around 25 to 30 per cent to 10 per cent could be achieved by applying them in combination. All of these interventions are available to HIV positive women, but depend upon the timing of the detection of HIV status. For instance, AZT is only available to pregnant women who are aware of their HIV antibody status prior to the third trimester of pregnancy.

334. The Education and Prevention Program has been a cornerstone of the effort to prevent the spread of HIV/AIDS in Australia. The Program has four main objectives:

> To improve knowledge of risk behaviours and skills in the assessment of risk;
>
> To facilitate and promote access to voluntary testing and preventive measures and programmes;
>
> To help people living with HIV/AIDS make informed decisions about their health and treatment; and
>
> To reduce myth, unnecessary fears and discrimination.

335. The main focus of the Program is people whose activities place them at greatest risk of infection and those already infected. The groups identified are: homosexually active men; injecting drug users and their sexual partners; Aboriginal and Torres Strait Islander peoples; and people living with HIV/AIDS.

336. A variety of education and prevention programmes targeting these identified groups have been developed by the federal and state governments and community groups. For example, the Needle and Syringe Availability Program was developed to ensure free access to needles and syringes by injecting drug users to minimize the risk of transmission of HIV through the sharing of needles and syringes. Consequently, Australia has one of the lowest rates of infection amongst injecting drug users.

337. Australia's education and prevention initiatives are internationally recognized for their innovative approach to health promotion, involving a

partnership between the affected communities, governments at all levels and medical, scientific and health professionals. The success of this approach is illustrated by the containment of the epidemic.

338. There are a number of bodies at the national level which consider a wide range of issues relevant to HIV/AIDS and other communicable diseases and are responsible for implementing education and prevention strategies. The Intergovernmental Committee on AIDS (IGCA) has representatives from federal and state governments and provides a forum for liaison and coordination of policy, finance, programmes and activities related to HIV/AIDS. The Australian National Council on AIDS (ANCA) is the Federal Government's key advisory body on HIV/AIDS and provides independent and expert advice to the Minister for Health. The Australian Federation of AIDS Organisations (AFAO) is the peak body for the affected community and provides services for and represents the interests of community groups affected by HIV/AIDS.

## Immunization

339. In keeping with the National Plan for Australia for the survival and protection of children, the National Childhood Immunisation Program (NCIP) contributes to increasing the chance of every child's survival and development and attainment of the highest standard of health possible. By reducing vaccine-preventable diseases, the NCIP will contribute to diminishing infant and child mortality in Australia.

340. Under the National Childhood Immunisation Program, universal vaccination of infants and children is encouraged in accordance with the National Health and Medical Research Council (NHMRC)'s standard childhood vaccination schedule. The vaccines on this schedule are provided by the Federal Government without cost to the parents.

341. The current NHMRC schedule recommends the following immunization programme:

- Ages two, four and six months: immunization against diphtheria, tetanus, whooping cough, poliomyelitis and haemophilus influenza type b (Hib);

- Age 12 months: immunization against measles, mumps, rubella and Hib;

- Age 18 months: immunization against diphtheria, tetanus, whooping cough and Hib; and

- Age five years: immunization against diphtheria, tetanus, whooping cough and poliomyelitis.

342. Australia has had a universal vaccination programme for children for over 40 years. However, continuing epidemics of vaccine preventable diseases indicate that current immunization rates are not sufficient to prevent the transmission of these diseases. Epidemics of whooping cough and measles have occurred recently, with 4,454 cases of whooping cough reported in 1993 and 5,491 in 1994. Notifications of measles numbered 4,736 in 1993 and 4,806

in 1994. Between 1983 and 1993 there were 41 deaths caused by measles. Further information is provided in paragraphs 834 to 841 of Australia's first report under the Convention on the Rights of the Child.

## Aboriginal and Torres Strait Islander peoples' health

### Mortality

343. For those parts of Australia where data are available (e.g. Northern Territory, South Australia, Western Australia and Queensland communities), it appears that the provision of better health care has contributed to a significant overall decline in Aboriginal infant mortality rates over the past two to three decades. More recently, between 1982 and 1992, the rates have remained stable due to a fall in neonatal deaths (0 to 4 weeks) and a rise in post-neonatal deaths (4 weeks to one year). Nonetheless, Aboriginal infant mortality rates remain high and, depending on location, can be more than three times the rate for all Australians. For example, information from Western Australia and the Northern Territory in 1992 indicated rates of 22.0 and 31.5 per 1,000 live births respectively, about three to four times higher than those for all Australians (7.0 per 1,000).

344. Low birth weights, which are associated with a higher infant mortality rate, are significantly more common among Aboriginal and Torres Strait Islander infants. Babies born to Aboriginal and Torres Strait Islander mothers had an average birth weight of 3,140 grams, which is 209 grams less than the average weight for all births. The birth rate for Aboriginal women is 46 per cent higher than for non-Aboriginal women. For details of total birth rates for the Aboriginal and total Australian populations and age-specific death rates by sex, Aboriginal and total Australian populations see tables 3 and 4.

345. The number of maternal deaths in Australia in the period 1988-1990 decreased by almost two thirds from the equivalent figure in the period 1970-1972. However, where data are available, they show that there has been no similar reduction in the number of Aboriginal maternal deaths. In the period 1988-1990 Aboriginal mothers accounted for almost 30 per cent of all maternal deaths but less than three per cent of all confinements.

346. In the period 1990-1992, Aboriginal life expectancy at birth was estimated to be between 57 and 60 years for males and between 61 and 64 years for females, i.e. around 15 to 20 years less than for non-Aboriginal Australians.

### Malnutrition

347. The National Food and Nutrition Policy identified certain groups in the Australian community which have poor levels of nutrition. These groups include Aboriginal and Torres Strait Islander peoples, who experience a range

of nutrition-related problems, including malnutrition. Federal Government projects currently under way which aim to improve the nutritional status of Aboriginal and Torres Strait Islander people include:

- Establishment of the Working Party on Aboriginal and Torres Strait Islander Nutrition, which will report to the National Health and Medical Research Council. The Working Party will look at culturally appropriate implementation, evaluation, education and training strategies in urban, rural and remote areas;

- Development of a comprehensive food and nutrition policy for the Northern Territory, which will seek to improve the availability, accessibility and affordability of nutritious food in consultation with Aboriginal communities, and which will be applicable to other States; and

- Production of an Aboriginal and Torres Strait Islander community nutrition manual based on extensive consultation with Aboriginal organizations and nutrition projects throughout Australia.

### Aboriginal and Torres Strait Islander children's health

348. A national survey completed in 1992 by the Aboriginal and Torres Strait Islander Commission on housing and community infrastructure needs found that the quality of water available for use by many Aboriginal and Torres Strait Islander people is lower than the standard recommended in the National Health and Medical Research Council guidelines on water quality. Of the 906 communities surveyed, 311 (14,616 people) relied on water which did not comply with these guidelines.

349. A combined meeting of federal and state ministers for health and Aboriginal ministers for health and aboriginal affairs held in December 1987 established a working party to look into the development of a national aboriginal health strategy. Its final report, published in March 1989 and developed in consultation with state governments and Aboriginal and Torres Strait Islander communities' representatives, led to the establishment of the Aboriginal Health Development Group to set priorities for implementation. The Group reported in December 1989.

350. The National Aboriginal Health Strategy includes a number of strategies to reduce the maternal mortality rate, develop culturally acceptable antenatal care and education, encourage and facilitate hospital delivery, and provide adequate resources for appropriate health services, particularly in poorly serviced areas.

351. More detailed information in relation to Aboriginal and Torres Strait Islander children's health and state initiatives is available in paragraphs 719 to 742 of Australia's first report under the Convention on the Rights of the Child.

Threat of war

352. Australia strongly supports international efforts to reduce the threat of war, in particular nuclear war.

353. Australia has long taken the view that the great issues of arms control and disarmament cannot be left just to the major powers to resolve. The Australian Government consequently plays an active and committed role in a wide range of international forums to promote the goals of disarmament and non-proliferation of nuclear weapons - especially the United Nations General Assembly; the various review conferences associated with the Nuclear Non-Proliferation Treaty and other major treaties, and the sole negotiating forum within the United Nations system for arms control agreements, the Conference on Disarmament in Geneva. Australia's involvement and influence in the Conference on Disarmament has grown markedly since the appointment in 1983 of a full-time Ambassador for Disarmament based in Geneva.

354. Australia played a leading role in the negotiation of the South Pacific Nuclear Free Zone Treaty (or Treaty of Rarotonga) which came into force in 1986, and was a key contributor to the negotiation of the Chemical Weapons Convention which was concluded in 1992. At home, it has enacted the Weapons of Mass Destruction (Prevention of Proliferation) Act 1995, which will enable the Government to prevent the supply of goods or the provision of services to assist programmes for the development of weapons of mass destruction.

355. Australia's profile in relation to a whole range of multilateral disarmament issues, both nuclear and non-nuclear, and our input to the work of the Conference on Disarmament, has been and continues to be quite high compared to our size as a nation or standing as a military power. Australia is one of a handful of most active countries in the world in pursuing these issues.

## Article 7

356. Torture and other cruel, inhuman, or degrading treatment or punishment is not tolerated in Australia and constitutes a criminal offence and civil wrong in all Australian jurisdictions. Australia ratified the Convention against Torture and Other Cruel, Inhuman or Degrading Treatment or Punishment on 8 August 1989 and the Convention came into force for Australia on 7 September 1989. Australia submitted its first report to the Committee against Torture on 9 September 1991 (CAT/C/9/Add.8).

357. In general, provided the requisite degree of intention or criminal negligence is proved, any use of force against a person is a criminal offence constituting assault or a more serious crime. The exceptions to this statement include the use of force:

> In self-defence, defence of another, or the defence of property, where no more force is used than is necessary;
>
> In the prevention of crime, or the effecting of a lawful arrest, where no more force is used than is necessary;

> In the course of the lawful correction of a child by its parents, teacher or person in loco parentis, provided no more force is used than is reasonable under the circumstances; and
>
> Where the use of force can be consented to, as in a boxing contest.

358. In no circumstances may force be used in obtaining a confession, or otherwise for intimidation or coercion. Police officers are instructed that no threat or inducement may be made to obtain a confession. The courts in all Australian jurisdictions have a wide discretion in criminal cases not to admit any evidence obtained unlawfully or unfairly where to admit such evidence would operate unfairly against the accused. For further discussion, see commentary under article 14 on the right to a fair trial, below.

359. In addition to the right to statutory damages, victims of crime or the relatives of a deceased victim have the right, in all jurisdictions, to bring an action in tort for damages against the transgressor or some other person or agency vicariously liable for the transgression (such as an employer, including governments). Damages may be awarded for physical injury, nervous shock, medical or other expenses and financial loss.

## Corporal punishment of children

360. Detailed information on the punishment of children is provided in paragraphs 403 to 422 of Australia's first report under the Convention on the Rights of the Child.

## Police

361. Police officers in each jurisdiction are bound by legislation and the rules of common law. Their obligations and duties as police officers are further elaborated in the relevant code of conduct applicable to them. Officers are instructed to treat those in detention with respect for their human dignity. Police officers are trained in the relevant criminal law applicable to their duties. This training details the circumstances in which force may be used and emphasizes that force is only to be applied where necessary and to the minimum extent necessary. For example, the Tasmanian Police Reference Manual Orders provide that:

> Unnecessary violence in making an arrest shall be avoided;
>
> (Officers) shall treat persons under arrest with all the courtesy to which members of the public are entitled;
>
> Persons under arrest shall be afforded no justification for saying that their treatment has been other than civil and reasonable;
>
> When interrogating persons suspected of having committed offences, any threat, promise or inducement to secure an answer is prohibited;

> The interviewing officer is required to take the interrogated persons to a senior officer independent from the investigation, who is to record whether there are any complaints as to the manner in which the person interrogated has been treated by officers.

362. The situations where force may be used include actions in self-defence, for the prevention of injury to the detained person or other persons, in making an arrest and for preventing escape from detention.

363. Issues relating to the police use of force were addressed in "Justice under scrutiny", the report by the Parliamentary Standing Committee into Aboriginal and Torres Strait Islanders on the inquiry into the implementation by governments of the recommendations of the Royal Commission into Aboriginal Deaths in Custody, released in November 1994.

364. The "Justice under scrutiny" report recommended that state governments urgently implement recruitment policies which will increase indigenous representation and implement the community based policing recommendations of the Royal Commission into Aboriginal Deaths in Custody. These recommendations have been referred to the Ministerial Council for the Administration of Justice.

365. Issues relating to the police use of force were also addressed in the report of the National Committee on Violence and action has been taken in most jurisdictions to implement any recommendations which were not already in operation.

366. An allegation of ill-treatment or brutality on the part of a police officer can render an officer liable to two types of charges - one under the police rules, regulations or orders, and another arising in the ordinary courts of law. Damages for malicious prosecution and false imprisonment are also available against police officers under the common law. Allegations of ill treatment or brutality by police officers may also be dealt with under legislation providing for complaints against police procedures.

Prisons

367. Like police officers, prison officers are bound not only by the rules of common law and criminal law, but also by internal disciplinary procedures. Prison officer training includes instruction in relation to the custody and welfare of prisoners and training in conflict management to enable a solution to be found without requiring physical restraint. Where physical restraint is required, prison officers are taught to apply it in the least injurious and restrictive way possible. Officers are instructed to respect the human dignity of those in detention.

368. The treatment of prisoners varies between jurisdictions. However, the treatment of prisoners generally accords with the Standard Minimum Rules for the Treatment of Prisoners, the principles of which are reflected in the Standard Guidelines for Corrections in Australia. These guidelines are not binding on states, rather they provide assistance to legislatures and prison authorities in the drafting of rules for the treatment of prisoners.

369. In New South Wales, regulations made pursuant to the Prisons Act 1952 in relation to prison discipline provide that:

> Order and discipline are to be maintained with firmness, but with no more restriction or force than is required for safe custody and well-ordered community life within the prison;
>
> At all times, the treatment of prisoners is to be such as to encourage their self-respect and a sense of personal responsibility;
>
> In dealing with a prisoner, a prison officer must use no more force than is reasonably necessary in the circumstances, and the infliction of injury on the prisoner is avoided if at all possible. Exceptions to this rule include:
>
> - To prevent the escape of a prisoner;
> - To search, where necessary, a prisoner or to seize a dangerous or harmful article;
> - To protect other persons;
> - To avoid imminent violent or destructive behaviour by prisoners;
>
> The following punishments are prohibited: being put in a dark cell or under mechanical restraint; solitary confinement; corporal punishment; torture or cruel, inhuman or degrading treatment; or any other punishment or treatment that may reasonably be expected to affect adversely the prisoner's physical or mental health.

370. Notwithstanding the position in New South Wales, solitary confinement for strictly circumscribed periods of time is retained as a form of punishment in most jurisdictions, as are restricted diets. Whipping as a form of punishment has been abolished in all states except Norfolk Island where, however, it has never been invoked. Corporal punishment was abolished in Western Australia in 1992 as a penalty under the Criminal Code. It had not been used as a penalty of the court since 1962.

371. The treatment of prisoners is discussed further in the commentary under article 10, Prison organization, below. Detailed information regarding children is provided in paragraphs 872 to 879 of Australia's first report under the Convention on the Rights of the Child.

372. All Australian jurisdictions have statutes which provide for admission into care, treatment, review and discharge of persons with a mental illness. The details of the legislation vary between jurisdictions. In some jurisdictions, applications for the admission of a person with a mental illness into care are subject to a judicial hearing; in other jurisdictions, patients are admitted upon medical certificate.

373. Mental health legislation makes it an offence to ill-treat or wilfully neglect a person with a mental illness who is receiving psychiatric treatment. Negligence in the treatment or care of a patient can also give rise to civil liability, not only by reason of the injury which is done to the patient but by reason of any injury sustained by third parties.

374. Because of the difficulty persons admitted as psychiatric patients have in seeking recourse to the usual legal remedies, mental health legislation in several jurisdictions contains provisions designed to assist in other ways. There is provision in most jurisdictions for institutions to be frequently visited by an Official Visitor (or equivalent) who must be available to receive complaints and who has a wide discretion to make inquiries, examinations and inspections. The legislation also typically requires that full records of patient treatment are kept. Patients' letters to certain officials (for example, members of parliament or the judiciary, the mental health authorities, the Official Visitor or Chief Medical Officer) must be forwarded, unopened, to those officials. Mental health legislation also contains provisions for periodic review of patients' progress and for their release.

375. Like the Victorian Guardian and Administration Board Act 1986, the Western Australian Guardianship and Administration Act 1990 provides for the appointment of a guardian for people with disabilities where they are incapable of looking after their own health or safety or unable to make reasonable judgments or in need of oversight care or control in the interests of their health and safety or protection and where they are in need of a guardian. Guardians are appointed by the Guardianship and Administration Board. The board does not make such an appointment unless it is satisfied that no less restrictive means of meeting the person's need is available.

376. The same Act also establishes the Office of the Public Guardian. The functions of the Public Guardian are to act as an advocate before the board; to investigate applications to the board; to present information to the board; to investigate any complaint or allegations; to seek assistance in respect of represented persons or proposed represented persons and to provide information and advice to them; and to promote public awareness and understanding by disseminating information concerning the functions of the Guardianship and Administration Board, the Public Guardian's Office and guardians and administrators.

377. The South Australian Guardianship and Administration Act 1993 provides for the protection of persons with a reduced mental capacity due to any cause. It provides for:

Appointment of alternative decision-makers;

Certain key life decisions to be subject to judicial scrutiny;

Establishment of a Public Advocate and guardian of last resort to promote interests of persons with a reduced mental capacity, individually and collectively;

Imposition of penalties for contravention of the Act.

378. The Tasmanian Government has recently tabled in Parliament the Guardianship and Administration Bill 1995, which creates a similar scheme to that which operates in Victoria and Western Australia.

379. The therapeutic treatment of persons with a mental illness is largely left to the discretion of the medical practitioner responsible for the treatment. The use of drugs, however, is regulated by poisons legislation in each jurisdiction. The use of mechanical restraints and seclusion is regulated in some jurisdictions; and in some jurisdictions, certain types of therapy may not be carried out without the prior consent of, inter alia, the patient's closest relative.

380. Medical practitioners are subject to the same high standard of care in treating mental illness as in treating other illness. If this standard is not met and the patient is adversely affected, the medical practitioner may be liable to criminal charges as well as civil proceedings.

381. State measures for the prevention of arbitrary detention of persons on the grounds of mental illness are discussed further in the commentary under article 9, Mental illness, below.

382. Except in an emergency, the consent of the patient, or those in law qualified to give such consent, is a necessary prerequisite for the giving of any treatment or the performance of any operation on the patient by a medical practitioner. This prerequisite applies to all patients, whether mentally ill or not, and whether in custody or not.

383. Australia supports the Helsinki Declaration, adopted by the 18th World Medical Assembly, Helsinki, 1964, revised by the 19th World Medical Assembly, Tokyo, 1975, and also the International Guidelines for Biomedical Research Involving Human Subjects published by the Council for International Organizations of Medical Sciences in collaboration with the World Health Organization in 1982. The National Health and Medical Research Council has issued, and regularly updates, guidelines in the form of a statement on human experimentation and associated supplementary notes. Briefly stated, these guidelines call for human experimentation to involve only those subjects who have freely consented to participate in the full knowledge of what is involved and knowing that their individual rights and welfare are fully protected.

384. The statement also requires researchers involved in human experimentation to be fully competent in, and aware of, all areas of their research field and further requires them to follow research protocols which are approved by the relevant institutional ethics committees. This statement does not have the force of law, rather it is intended primarily as a guide on ethical matters bearing on human experimentation for research workers and administrators of institutions in which research on humans is undertaken in Australia. However, the knowledge that funding can and will be withdrawn from researchers failing to adhere to the guidelines provides a very powerful and effective regulatory mechanism.

385. Under Australia's federal arrangements, state governments have responsibility for legislating in this area. Three states, Victoria,

South Australia and Western Australia, have introduced specific legislation governing reproductive technologies and embryo experimentation. In all three states the legislation prohibits research that might be detrimental to the embryo. In addition, embryo experimentation is addressed in the ethical guidelines issued by the National Health and Medical Research Council. The guidelines, which are currently under review, permit embryo experimentation but not cloning experiments, provided embryonic development does not continue beyond the stage at which implantation would normally occur.

## Article 8

386. Slavery and the slave trade are prohibited in Australia under the provisions of the United Kingdom Slavery Abolition Act 1833 and the Slave Trade Act 1842, which remain in force throughout Australia. Australia has also ratified the Slavery Convention of 1926 and the Supplementary Convention on the Abolition of Slavery, the Slave Trade and Institutions and Practices Similar to Slavery of 1956. Australia has notified the United Nations pursuant to the relevant United Nations resolution, that it considers its laws and practices to be in accord with the requirements of these Conventions. Australia is also a party to several United Nations conventions concerning the traffic in persons.

387. In addition, the criminal and civil law in Australia protects persons from activities that are associated with slavery and servitude. For example, abduction is prohibited throughout Australia by a variety of criminal offences, such as the abduction of a woman (and, in some jurisdictions, any person) for sexual purposes, child stealing, kidnapping and hijacking. Any physical force applied to a person without consent, or the threat of such force, is a criminal offence and also gives rise to a civil remedy in damages.

388. The total or partial restraint of a person, intentionally and without lawful excuse, is also unlawful. The remedy of habeas corpus would be available at the instance of the restrained person or a friend or relative, as well as a claim for damages under the civil law action of trespass or false imprisonment.

389. Evidence of the traffic of Asian men, women and children into Australia for the purpose of prostitution has recently come to the attention of Australian law-enforcement agencies. Australia is concerned to ensure that these practices are eliminated and is currently considering ways in which to ensure that offenders are prosecuted and punished appropriately.

390. Violence perpetrated against women by men often involves forms of abuse which results in physical restraint, sexual servitude, forced social isolation and/or economic deprivation. Governments' responses to the general issue of violence against women has been dealt with under article 3.

391. Laws regulating prostitution, which is generally defined as acts of vaginal, anal, oral or manual sex between persons of the same or different sexes (including transsexuals) for financial gain, vary between the states. Throughout Australia the act of prostitution itself is legal, but activities surrounding and associated with prostitution attract criminal sanctions.

Since 1985, the trend in Australia has been to decriminalize and regulate prostitution. This policy reflects the recognition that throughout the world criminal sanctions have proved to be ineffective in reducing the incidence of prostitution, have created opportunities for police corruption and allowed the exploitation of the human rights of prostitutes.

392. Laws in most states prevent a person who is engaged in prostitution from being dependent on another person. For example, living off the earnings of a sex worker remains prohibited in most Australian jurisdictions (see the South Australian Summary Offences Act 1953, the Tasmanian Police Offences Act 1935, and the Western Australian Police Act 1892). In New South Wales, living off the earnings of a prostitute is illegal at present (see Summary Offences Act 1988) but under the Disorderly Houses Amendment Act 1995, which has yet to go through the New South Wales Upper House, this will exclude brothel managers, owners and workers. Street prostitutes will be excluded so it will still be illegal to live off the earnings of street prostitution. In Victoria, under the Prostitution Control Act 1994, it is an offence for a person to knowingly live wholly or in part on, or derive a material benefit from, the earnings of prostitution, unless the person has been granted a licence by the Prostitution Control Board. The Prostitution Control Act 1994 makes it an offence to force a person into or to remain in prostitution or to provide financial support out of prostitution, by assault, threats of assault, intimidation or by supply of drugs.

393. Some legislatures have taken specific measures to prevent a person being forced to engage in prostitution. In Victoria the Prostitution Control Act 1994 creates the offences of forcing a person, by assault, threatened assault, intimidation or supply of drugs or false representations, or false pretences, or other fraudulent means, to enter or remain in prostitution, or to provide financial support out of prostitution. In the Northern Territory, the Prostitution Regulation Act 1992 provides for similar offences. In Queensland, the Criminal Code prohibits the procurement of sexual acts by coercion.

394. In addition, it is generally an offence to manage or keep a brothel (see the South Australian Summary Offences Act 1953, the Tasmanian Criminal Code, and the Western Australian Police Act 1892). In Victoria a person may not carry on the business of operating a brothel without being licensed to do so under the Prostitution Control Act 1994. In New South Wales, while managing a brothel is not an offence, entering a "disorderly house" is prohibited. Under the Disorderly Houses Act 1943, where premises are habitually used for prostitution, they may be declared to be a "disorderly house". The new Disorderly Houses Amendment Act 1995 (NSW) will remove the possibility of a brothel being automatically defined as a "disorderly house" simply because it is a brothel. Henceforth a brothel will only be a "disorderly house" if it is actually disorderly, for example noisy or violent. In the Australian Capital Territory, it is an offence under the Prostitution Act 1992 not to notify the Registrar of Brothels and Escort Agencies within seven days of the commencement of operation of a brothel. However, the operation of a brothel is not illegal. In the Northern Territory, the Prostitution Control Act 1994 provides for an offence of

keeping a brothel, however it sets up a licensing scheme for "escort agencies" whereby a person may apply for a licence to be granted by the Escort Agency Licensing Board.

395. The Federal Government has also taken steps to preclude international traffic in girls and women for the purposes of prostitution. Methods used are:

Monitoring applications for visas in countries regarded as "high risk";

Cooperation with overseas Governments to improve cross border criminal investigation; and

Penalizing those who import women to work illegally as prostitutes.

396. The Federal Government's legislation dealing with the sexual exploitation of children overseas by Australians is discussed further in paragraphs 1735 to 1738 of Australia's first report under the Convention on the Rights of the Child.

397. Although there are no laws in Australia that specifically make the exaction of forced or compulsory labour punishable as an offence, the civil and criminal laws do provide some sanctions which may be relevant, for example, for assault, unlawful arrest and false imprisonment. Australia is a party to both ILO Convention No. 29 (Forced Labour Convention 1930) and ILO Convention No. 105 (Abolition of Forced Labour Convention 1957).

398. Contracts for services and contracts of service are freely entered into in Australia on normal contractual principles and may be terminated in accordance with the terms of the contract - generally by notice given to the parties. In an action for breach of such a contract, a court will generally not award specific performance. Any clause in a contract which could be viewed as involving elements of servitude or forced labour would very likely be held to be contrary to public policy and therefore unenforceable.

399. The terms and conditions of most forms of employment are regulated throughout Australia by industrial laws and enterprise agreements and awards, the terms of which differ in detail. Industrial laws cover such matters as safety measures, the hours of work and workers' compensation. Industrial awards and enterprise agreements cover such issues as the classification of work, minimum wages and employment conditions. The protection of children and young persons in this regard is dealt with in further detail under article 24.

400. In most Australian jurisdictions, persons convicted of criminal offences or common law misdemeanours may be sentenced to imprisonment with hard labour for any part of their sentence. Where such work or service is exacted from a person as a consequence of that person's conviction, it is carried out under the supervision and control of a public authority, usually acting under the relevant Prisons Act. Imprisonment with hard labour was abolished in Western Australia in December 1992 and in the Northern Territory with the introduction of the Criminal Code on 1 January 1984. Under the Northern Territory Prisons (Correctional Services) Act 1980, prisoners may be

required to carry out work as directed by the Director of Correctional Services, who must take into account the prisoner's physical and medical capacity. In the Australian Capital Territory, imprisonment with hard labour is not a sentencing option. Under the Victorian Corrections Act 1986, the Director-General of Corrections is able to direct any prisoner to work in any work programme approved by the Director-General. Hard labour was abolished in South Australia in 1988 by the Criminal Law (Sentencing) Act.

401. A number of alternatives to minimum security imprisonment are now in operation throughout Australia. The various schemes include periodic detention (for example, weekend attendance), attendance orders (involving some compulsory education), work release orders and community service orders. Of these, only the community service order is relevant in the context of this article. Under a community service scheme, a convicted person may, as an alternative to imprisonment, be directed to report from time to time to perform unpaid work in the community. The Australian Government considers schemes such as this to be in line with the requirements of this article.

402. Almost all jurisdictions have made provision for a form of community service scheme. For example, in 1983 the Community Service Orders Act came into operation in the Territory of Norfolk Island. Under this Act the court may make a community service order in respect of a convicted person only with that person's consent. The number of hours of community service that may be imposed in any case is proportionate to the term of imprisonment that could be imposed on the offender.

403. The service which can be required of any person who has volunteered or, in time of a threat to national security, has been required to serve in the military forces, under the provisions of the Federal Defence Act 1903, is necessarily of a purely military character. Australia has no provision for compulsory military service in peacetime. Provision for compulsory military service is under the National Service Act 1951. However, this provision has not been used since 1973.

404. Persons in the military service may be ordered to assist in emergency situations referred to in the comments on article 4. Such compulsory but non-military work is only resorted to in the circumstances envisaged in paragraph 3 (c) (iii) of this article and, accordingly, is not inconsistent with the requirements of the article.

## Article 9

405. In Australia, deprivation of liberty can occur:

Following arrest for an offence, where the arrested person is held in custody until brought before a court;

Following commitment to a penal institution, which can only be pursuant to a court order;

Following the arrest of a person who is not lawfully in the country, with a view to the taking of deportation proceedings; and

> Where a person is committed to an institution other than a penal institution, for example, a mental health hospital or institution or youth training centre.

406. Moreover, protective intervention is allowed in certain areas: mental health, communicable diseases, drug and alcohol abuse, and children in need of protection.

407. However, the liberty and security of the person are safeguarded in each of the Australian jurisdictions by the common law. Safeguards are also built into the relevant legislation with the aim of preventing abuses.

## Mental illness

408. In all Australian jurisdictions, persons may be compulsorily admitted for a limited period to a hospital for observation and assessment (for example, by the order of a magistrate on the application of a relative, or at the instance of the police). Detention in a hospital however, requires a court order in some jurisdictions or, in other jurisdictions, at least two independent medical recommendations for detention. Various mechanisms are prescribed for the discharge of patients. Some of these utilize detention for a prescribed term, followed by a formal review (for example, before a mental health tribunal). Others utilize a system of regular periodic review. In each jurisdiction, application for discharge may be made to the authority prescribed or to the Supreme Court. In the following sections, federal and state legislation is examined in detail.

### Federal matters

409. Divisions 6 to 9 of Part IB of the Federal Crimes Act 1914 commenced on 17 July 1990. The legislation provides a new, comprehensive regime for dealing with persons who are found unfit to plead or to be tried or who are acquitted on the grounds of mental illness. Before the implementation of this regime persons found unfit to be tried or acquitted on the grounds of mental illness could be detained at the Governor-General's pleasure.

410. Where a prima facie case exists in relation to an indictable offence the court can order detention in a hospital if it finds that:

> A person is unfit to plead but that he or she will become fit to plead within 12 months;
>
> There is treatment available for her or him in a hospital; and
>
> He or she does not object to going to hospital.

411. If the above conditions are not met then the court can order detention in a place other than a hospital or grant conditional bail. These orders end when the person becomes fit to plead (at which time the legal proceedings resume) or once 12 months has expired, whichever is sooner.

412. If after 12 months the person is still not fit to be tried, the court must determine again whether there is treatment available and, if he or she does not object, the court can order that the person be detained in a hospital. Alternatively, the court can order the person's release either absolutely or conditionally. Any conditions imposed apply for a period of no more than three years.

413. If the person objects to the detention order the court can order that he or she be detained in a place other than a hospital. The period of detention ordered cannot exceed the maximum period of imprisonment that could have been ordered if the person was convicted of the offence charged. The Federal Attorney-General must review the order every six months to determine if the person should be released. In so doing the Attorney-General must have regard to reports, including psychiatric reports. A release order can impose conditions for five years and can be revoked by the Attorney-General within that period of five years. If a person's release order is revoked the order is reviewed by the Attorney-General every six months with a view to determining whether or not he or she should remain in custody.

414. In the case where a person is acquitted because of mental illness in relation to an indictable offence, the court may order that person's detention in hospital or prison for a period not exceeding the period of imprisonment that could have been imposed on conviction. The powers and duties of the Federal Attorney-General, or in an emergency an officer of the State in which the person is detained, are the same as where a person who is unfit to be tried has had a detention order extended.

415. The sentencing option available to a court exercising jurisdiction in relation to an indictable offence and to a person with a mental illness is to order the person's detention in a hospital or other place for the purpose of receiving treatment. The period of the order cannot be longer than the term of imprisonment to which the person would have been sentenced.

### State matters

### Australian Capital Territory

416. The Mental Health (Treatment and Care) Act 1994 was enacted in response to recommendations contained in the Balancing Rights Report of the Australian Capital Territory Mental Health Review Committee. The objectives of the Act include providing treatment, care, rehabilitation and protection for mentally dysfunctional persons in a manner that is least restrictive of their human rights. Section nine provides for the maintenance of the freedom, dignity and self-respect of mentally dysfunctional persons.

417. Part V of the Act provides for the emergency detention of mentally dysfunctional persons in an approved facility. A police officer, a

registered medical officer or a mental health officer may apprehend a person who is apparently mentally dysfunctional if he or she reasonably believes that:

> The person is mentally dysfunctional and as a consequence requires immediate treatment or care and the person has refused to receive that treatment or care; and
>
> Detention is necessary for the person's own health or safety, or for the protection of members of the public.

418. In the case of the medical practitioner and the mental health officer, there is the additional requirement that they must reasonably believe that adequate treatment or care cannot be provided in a less restrictive environment.

419. The police officer, doctor or mental health officer must provide a statement of action as soon as practicable to the person in charge of the approved facility to which the person has been taken. This statement must include detailed reasons for the action taken and the extent of any force or assistance used to enter premises or apprehend the person. Within four hours of the person's arrival at the facility the person must be examined by a doctor, who may authorize the detention for up to 72 hours. The Community Advocate and the Mental Health Tribunal must be informed of the emergency detention within 12 hours of the authorization. A physical and psychiatric examination of the person must be performed within 24 hours of the emergency detention. The Tribunal may order further detention of the person for up to seven days after the expiration of the initial period.

420. Part VI of the Act sets out the rights of mentally dysfunctional persons admitted to or receiving treatment at the approved facility, including the provision of certain information in a language with which they are familiar. This information includes the right to obtain legal advice and to seek a second opinion from an appropriate mental health professional. They also have the right to communicate with persons of their choice and the facility must provide, when requested, facilities for writing communications. The Mental Health Tribunal is a new body established under the Act which replaces the Magistrates Court as the relevant determinative body in relation to mentally dysfunctional persons. The Tribunal hears and determines applications for the release of persons involuntarily detained under the Act.

421. The Community Advocate Act 1991 provides for the appointment of a Community Advocate, part of whose duties are to protect the rights of persons with a legal (due to age), physical, mental, psychological or intellectual disability and of a person whose condition would render him or her a forensic patient.

### Crimes (Amendment) Act 1994

422. As with federal and New South Wales legislation, the Crimes (Amendment) Act 1994 together with Part VIII of the Mental Health (Treatment and Care) Act 1994 provide a new regime for dealing with persons who are found unfit to plead or who are acquitted on the grounds of mental illness. A determination

as to fitness to plead is made by the Mental Health Tribunal. If a person is found unfit to plead to a charge, after 12 months a special hearing must be conducted in court. The verdicts available at such hearings provide that an accused person may be found not guilty, and acquitted; if the accused is not acquitted, he or she can be diverted to the Mental Health Tribunal for the making of a mental health order or ordered to be detained in custody. Persons who are ordered to be detained in custody must be reviewed at least every six months by the Mental Health Tribunal, which has the power to order their release where it is appropriate to do so. Where an accused person is acquitted on the grounds of mental illness, the Court may order that he or she submit to the jurisdiction of the Mental Health Tribunal for the making of a mental health order or that he or she be detained in custody. If a person is detained, the Tribunal must review his or her welfare at least every six months and has the power to order the person's release where it is appropriate to do so. Unless a person has committed a serious offence, the court also has the capacity to make such orders that it considers appropriate (including an order to release a person) where a person is acquitted on the grounds of mental illness or following a special hearing.

423. The Crimes (Amendment) Act 1994 places a limit on detention so that a mentally ill person cannot be detained for a period greater than the maximum period of imprisonment to which he or she could have been sentenced if convicted of the relevant offence in normal criminal proceedings.

### New South Wales

424. In New South Wales, the Mental Health Act 1990 provides safeguards against the arbitrary detention of persons on the grounds of mental health. A person with a mental illness must not be admitted or detained in a hospital unless the medical superintendent is of the opinion that no other care of a less restricted kind is appropriate and reasonably available to the person.

425. There are three primary mechanisms for the non-voluntary admission of persons to psychiatric hospitals:

> On the certificate of a medical practitioner, who must have personally examined the patient;
>
> At the written request of a relative, friend or welfare officer: requests are made to the medical superintendent of the hospital, who must be satisfied that the situation is an emergency and that access to a medical practitioner is, under the circumstances, difficult;
>
> Police and court admission: the police may apprehend a person and take him or her to a hospital if they have found the person in a public place and believe the person to be mentally disturbed and believe that he or she has recently committed an offence or is likely to harm himself or herself. A person appearing in court charged with a minor offence can be directed to a psychiatric hospital for assessment if it appears the person would be appropriately dealt with under mental health law.

426. In all of these situations, the person must be examined within 12 hours of arrival at hospital by a doctor and, if detained, be examined as soon as practicable by a second doctor (at least one of these doctors must be a psychiatrist). If there is a divergence of opinion over whether detention is appropriate, the patient must be examined by a third doctor (a psychiatrist). Persons diagnosed with a mental disorder can be detained for a maximum of three days. Persons with mental illness must be brought before a magistrate as soon as possible. Magistrates make weekly visits to all psychiatric hospitals where persons are detained. If the magistrate finds that the patient is a person with a mental illness, detention for up to three months may be ordered. There is a right of appeal to the Mental Health Review Tribunal. The Tribunal also considers applications from medical superintendents wishing to detain a patient for a period longer than that initially ordered by the magistrate.

427. Under the Mental Health Act 1990, the Mental Health Tribunal must review each detained patient once every six months to determine whether the patient is suffering from a mental illness and should continue to be detained. A right of appeal to the Supreme Court is provided with respect to any determination of the Tribunal or a failure or refusal of the Tribunal to make a determination.

428. Similarly to the federal legislation referred to above, the Mental Health (Criminal Procedures) Act 1990 makes special provisions regarding a person who, on the ground of mental illness, is unfit to be tried in court. A person may be found unfit to be tried for an offence by a jury, or in some cases by a judge alone, on the grounds of mental illness. Upon such a finding, to be made on the balance of probability, the court must refer the person to the Mental Health Tribunal, which will make a determination that the person will or will not become fit to be tried for an offence, which determination may be appealed in the Supreme Court.

429. If the Tribunal finds that the person will not be fit to plead within 12 months, the New South Wales Attorney-General may direct a special hearing in respect of the offence or advise that no further proceedings be taken against the person. In the latter case, the court must order the release of the person. If a jury or court at a special hearing returns a verdict of not guilty by reason of mental illness, the court must order that the person be detained in custody, in such manner as the court thinks fit, until released by due process of law.

### Northern Territory

430. In the Northern Territory, the Mental Health Act 1980 provides for the compulsory detention of persons with a mental illness. Under the Act, a magistrate can issue a warrant to take a person into custody for up to three days if that person has a mental illness which requires treatment, is incapable of self-care and is likely to cause harm to self or others. Detention beyond three days requires the Northern Territory's Chief Medical Officer to apply to a magistrate for an order. Orders do not usually exceed six months.

431. A medical practitioner on duty in or near a hospital, or a police officer, can take a person with a mental illness into custody without a warrant. To take a person into custody without a warrant, the practitioner or officer must have formed the view that the person is mentally ill and be satisfied that the person:

> Requires care and control and is incapable of managing his or her own affairs; or
>
> Is not under adequate care and control; or
>
> Is likely to cause serious harm or death to himself or herself or another; and
>
> Should be taken into custody in his or her own or the public's interest.

432.• Within 24 hours of detention without warrant, the Chief Medical Officer must make an application to a magistrate for an order. Within three days, the Chief Medical Officer must sight the reports of two independent medical practitioners which agree to treatment for the person with a mental illness. Every six months the same process is repeated.

433. Persons appearing before a magistrate are entitled to legal representation. The subject of the order, a relative, a guardian, the Chief Medical Officer or an interested party may apply to the Supreme Court to review the order of a magistrate.

434. The Mental Health Act 1980 is currently under review.

### Queensland

435. The Mental Health Act 1974 makes provision for detention of people suffering from mental illness. The Act applies also in relation to persons who have a drug addiction or an intellectual handicap. The Mental Health Act 1991 is being reviewed with the intention of bringing it into line with the United Nations Principles for the Protection of Persons with Mental Illness and the Improvement of Mental Health Care.

436. The Act provides three potential mechanisms for non-voluntary admission:

> Application for admission: completed by next of kin or other person authorized under the Mental Health Regulations 1985, supported by a registered medical practitioner. Detention under this mechanism is for 72 hours only. Longer detention depends on the advice of another medical practitioner.
>
> Warrant before a justice of the peace: completed by a member of the public before a court. If issued by a court, police can detain the person for examination by a registered medical practitioner and an

> authorized person. If these people agree, the detained person can be admitted to hospital for examination. The person can be detained only on the advice of an independent medical practitioner.
>
> Police admission: If the police believe a person is behaving in a way which may lead to self-harm or harm to others and that his or her behaviour is the result of a mental condition, that person can be admitted to hospital for examination. A person can be detained only on the advice of an independent medical practitioner.

437. There are no provisions in the Queensland Mental Health Act 1991 to prevent a voluntarily admitted person from leaving a facility, unless that person has been deemed to be in need of treatment as a non-voluntary patient. A person can appeal against non-voluntary admission to the Patient Review Tribunal. All cases of non-voluntary detention are reviewed by the Tribunal after detention beyond 21 days. In addition, a person can make an application for review to the Patient Review Tribunal and can appeal to a higher body, the Mental Health Tribunal. A person may seek a second opinion from another medical practitioner and consult with a legal adviser. He or she may also make a complaint to the Health Rights Commission. The Health Rights Commission is an independent statutory body which has the power to investigate complaints against health service providers in both the public and private health sectors, conciliate disputes and protect the rights of health service consumers.

### South Australia

438. In South Australia the powers of detention of persons with a mental illness are contained in the Mental Health Act 1993. The Health Commission is responsible for the administration of the Act. Appeals are heard by the Guardianship Board.

439. There is one method of non-voluntary admission in South Australia. A medical practitioner can make an order for the detention of a person if he or she considers that the person is suffering from a mental illness that requires immediate treatment, that the treatment can be obtained by admission to and detention in an approved hospital and that the person should be admitted in the interests of her/his own health and safety or for the protection of others. Such an order is only valid for three days and must either be confirmed or discharged by a psychiatrist as soon as possible within the three days. Detention can only be extended for a further 21 days after examination and agreement by two psychiatrists. Beyond that period of 42 days, a tribunal must review the matter.

440. The Act does not specify an age limit for detention. Accordingly, children and adolescents may be detained on occasions.

### Tasmania

441. In Tasmania, a person can be admitted on a non-voluntary basis into detention on the grounds of mental illness under the Mental Health Act 1963. Each order requires an application by a relative and a medical practitioner.

442. Persons can be admitted on a 3 day, 28 day or a 6 month order. The 28 day and 6 month orders require a second medical opinion. Such admission may be either for observation or treatment. The authority to detain expires after one year. Emergency application for observation may be made by a medical practitioner in the case of urgent necessity; such detention is for 72 hours.

443. Review of the decision to detain is available. Application may be made to the Mental Health Review Tribunal by or on behalf of a patient. The Tribunal has various powers, including the discharge of the patient. A patient or near relative may appeal to the Supreme Court if dissatisfied with the decision of the Tribunal.

### Victoria

444. In Victoria, a person may be admitted to and detained in a psychiatric in-patient service as a non-voluntary patient only if he or she appears to be mentally ill, can have the illness treated by the service, is a danger to self or others, cannot receive adequate treatment in a less restrictive setting and does not or cannot consent to the necessary treatment.

445. The principal mechanism for non-voluntary admission in Victoria is a request from a relative, friend, police officer or any other person supported by a recommendation from a medical practitioner. Following written request a medical practitioner must examine the person prior to issuing a recommendation. Once the person is admitted to hospital, examination by a psychiatrist must occur within 24 hours. The police may detain a mentally ill person and transport him or her to a medical practitioner.

446. The Mental Health Review Board automatically reviews all patients' cases six to eight weeks after the person is admitted to hospital. At any time, a detainee can appeal non-voluntary admission by writing to the Mental Health Review Board, the Chief Psychiatrist, an authorized psychiatrist, a community visitor, the Ombudsman or the Health Services Commissioner.

### Western Australia

447. In Western Australia, a person can be admitted non-voluntarily into a psychiatric facility under the Mental Health Act 1962 on:

> An order of a medical practitioner stating that, in his or her opinion, the person appears to be suffering from a mental disorder requiring treatment;
>
> An order of a court before which a person stands charged with an offence, stating that the person is, or may be, suffering from a mental illness; or
>
> An order of the Governor where a person has been found unfit to plead guilty or not guilty on the grounds of insanity in the Supreme Court.

448. In the first two cases a psychiatrist must examine the person within 72 hours to determine whether or not the person should be admitted. In the third, the Governor in Executive Council determines the disposition of the patient.

449. There are a number of avenues of appeal:

Each approved hospital has a board of visitors which is appointed by, and directly responsible to, the minister. The board hears patient complaints and appeals against detention and may discharge a patient;

Any person may make an application to the superintendent for discharge of a patient and the superintendent must make a determination within 72 hours in relation to the patient's discharge;

A patient may make application to the Director of Psychiatric Services for discharge; or

Any person may make application to the Supreme Court for discharge from detention in hospital.

## Communicable diseases

450. The Federal Quarantine Act 1908 provides for national controls over the movement of persons, goods and vehicles to prevent the introduction or movement of quarantinable diseases during a declared human quarantine emergency. Persons, goods and vehicles originating from countries or areas declared to be infected with agents or vectors of quarantinable diseases may be subject to special entry requirements.

451. Other legislation that deals with issues of public health including Human Immunodeficiency Virus (HIV) exists at state level in Australia. Examples are outlined in the following sections. In general, public health legislation as it applies to communicable diseases incorporates notification of the disease, powers of detention or isolation, powers to declare areas of quarantine and powers to compel testing.

452. In some jurisdictions, Acquired Immune Deficiency Syndrome (AIDS) and HIV infection have been added to an already existing list of "notifiable" diseases and are therefore subject to a similar legal regime based on more traditional public health approaches. As a result, in the case of HIV or AIDS notification, practice may differ substantially from the legal requirements. Although legislation in some jurisdictions requires nominal notification, in practice, most jurisdictions use coded data. In 1989, the Federal Government released a national HIV/AIDS strategy - Australia's policy response to the HIV/AIDS epidemic. The strategy also included an agenda for appropriate law reform. In November 1992, the Legal Working Party of the Intergovernmental Committee on AIDS released its final report. Recommendation 2.5 stated:

> "Powers in public health legislation to place restrictions on the living circumstances and employment of HIV-infected persons who put

> others at unreasonable risk of infection should be characterized by a graded series of interventions and only used in exceptional cases, with isolation being a last resort.
>
> "Public health offences which were formulated to control serious infectious diseases that can be transmitted by casual contact should be repealed or amended so that they do not apply to HIV.
>
> "A public health offence should exist in the case where a person knows that he or she is HIV-infected and significantly exposes or infects another person without his or her consent. Such an offence should provide for a full defence where protective measures are insisted upon in cases of significant exposure. A lesser penalty should apply in cases of actual infection where protective measures, as advised by health authorities from time to time, have been taken, but have not prevented transmission. Charges under these offences should only be brought after approval by public health authorities rather than police.
>
> "Special as opposed to existing general criminal law sanctions should be carefully considered by State and Territory Governments because of the danger of stigmatising already alienated groups."

453. Recommendations were also made in the report aimed at increasing review and appeal rights and allowing for in camera court proceedings. At this stage, the Australian Capital Territory, the Northern Territory and Western Australia have no form of in camera proceedings.

454. These recommendations are being monitored by the HIV/AIDS Implementation Working Group (a federal body with community representation), which regularly reports to the Standing-Committee of Attorneys-General (SCAG). A status report is currently being prepared for submission to SCAG on the implementation action taken in relation to each recommendation. Some jurisdictions have set up their own bodies to review implementation action, for example, New South Wales (the Puplick report) and South Australia (the Sarre report). Other states are being encouraged to follow this model.

### Australian Capital Territory

455. The Public Health Act 1928 and regulations made under that Act provide for the control of certain infectious and notifiable diseases including HIV/AIDS in the Australian Capital Territory. Under the regulations, where a person is found to be suffering from a notifiable disease, a medical officer in the Department of Health has various powers for the purpose of preventing transmission. The medical officer may enter the premises of the person, examine residents of the premises and require such people to undergo medical examination. If a person fails to comply with a direction to undergo testing or furnish information, he or she may be removed by an authorized officer to a place of isolation and detained for the necessary period required to ensure the person is not a source of infection.

### New South Wales

456. In New South Wales, the Public Health Act 1991 provides for the control of scheduled diseases, including leprosy, tuberculosis, HIV and AIDS. If the Director-General of the Department of Health believes on reasonable grounds that a person is suffering from one of these diseases, the person may be required to undergo a medical examination.

457. If a medical practitioner authorized by the Director-General of Health is satisfied on reasonable grounds that a person is suffering from a scheduled disease and behaving in a way that is endangering the health of the public, the practitioner may make a written public health order. A public health order may have any one of the following effects: restraint of conduct, compulsory treatment or counselling, compulsory supervision or detention.

458. A person detained under a public health order may be permitted to leave the place of detention, however only under constant supervision. A public health order has effect for 28 days and must be confirmed by a local court as soon as practicable. A copy of the application for confirmation must be served on the relevant person within three days for the order to have effect. Before the expiry of a public health order an application may be made to the district court for a continuation of up to six months. A person may appeal to the district or Supreme Court on a matter of law or to the district court in relation to an order for continuation.

### Northern Territory

459. In the Northern Territory, under the Notifiable Diseases Act 1981 a medical officer may serve a notice on a person infected or suspected of being infected with a notifiable disease (including HIV) directing the person to carry out measures necessary for the treatment or prevention of the disease. The person served with a notice may appeal to the local court against the directions contained in the notice. If the person fails to comply with a notice the Chief Medical Officer of the Department of Health may order that the person be removed and detained at a hospital or other place. Further, the Chief Medical Officer may require a person or class of persons to attend a medical examination and to answer questions to determine whether they are infected with a certain disease. The Administrator or Minister may declare an area to be an isolation area and as such may prohibit the movement of persons and require medical examination and treatment.

### Queensland

460. In Queensland, the Health Act 1937 provides for the control of "notifiable diseases". This term has included HIV since 1988. Under section 36 (1) of the Act, a person may be detained after a medical practitioner has provided a certificate outlining his or her suspicion to the Chief Health Officer, who may then act by making an application to a justice of the peace for a detention order.

461. A person detained must remain in the hospital or temporary isolation place for the period that the chief officer in the Department of Health

considers necessary for testing or treatment. Further, the person in charge of a hospital or temporary isolation place may exercise such force as is reasonably necessary for the purpose of detaining, isolating, testing or treating the person.

462. According to the Queensland Government, these provisions are rarely used and almost invariably have been applied to persons suffering from pulmonary tuberculosis. However, the Queensland Government's draft protocol for the management of HIV-positive people whose behaviour constitutes a public health risk outlines the procedure for the management of HIV-positive people whose behaviour puts others at risk. This protocol is utilized rather than the detention provisions contained in the Health Act 1937.

### South Australia

463. The Public and Environmental Health Act 1987 provides for the control of certain communicable diseases including HIV. Where the South Australian Health Commission has reasonable grounds to suspect that a person is or may be suffering from a controlled notifiable disease, it may give notice in writing requiring the person to present him or herself for a medical examination. If the person fails to comply with the notice, a magistrate may issue a warrant for the apprehension and examination of the person, who may be detained for up to 48 hours for the purpose of examination. There is provision for reasonable compensation where the examination discloses that the person is not suffering from the disease.

464. Where a medical practitioner has certified that a person is suffering from a controlled notifiable disease and the Commission is of the opinion that in the interests of public health a person should be kept in quarantine, a magistrate may, on the application of the Commission, issue a warrant for the person's detention. However, the person must be given a notice setting out the reason for the detention. A person may only be detained for 72 hours unless a magistrate extends the period after hearing representations by the person. The extension can be for no longer than six months unless authorized by a Supreme Court judge. There is a right of appeal against a magistrate's directions and orders for detention and apprehension to a judge of the Supreme Court.

465. The Commission may impose conditions on a person suffering a notifiable disease to prevent the spread of the infection, including restrictions on residence and performance of work, compulsory supervision and subjection to medical examination. A person so directed may apply to a magistrate for a review of this direction. A person who fails to comply with a direction risks sanctions. However, an appeal may be made to a single judge of the Supreme Court.

### Tasmania

466. The Public Health Act 1962 provides the Minister of Health with broad powers in respect of infectious and notifiable diseases, including HIV. For the purpose of more effectively checking or preventing the spread of an infectious disease, the Minister has various powers. He or she may require a

person to undergo medical examination and treatment, impose restrictions on movement, isolate any part of the state and require persons to be isolated, quarantined or disinfected.

467. In addition to the Act, the HIV/AIDS Preventive Measures Act 1993 provides for compulsory testing and orders in some circumstances. The Secretary of the Department of Health may require an HIV test if satisfied on reasonable grounds that a person is infected with HIV and behaving in a way which places others at risk. Further, where the Secretary believes that a person with HIV is recklessly placing others at risk or not taking all reasonable measures and precautions to prevent transmission, the Secretary may apply to a magistrate for an order which requires medical and psychological assessment, isolation, detention or the imposition of restrictions on that person. An order lasts for 28 days and may only be extended by a magistrate.

### Victoria

468. The Victorian Health Act 1958 provides for the regulation of persons with infectious diseases including HIV. If the Chief General Manager of the Department of Health reasonably believes that a person has an infectious disease, is likely to transmit that disease and is a serious risk to public health, she or he may make various orders. The Chief General Manager may require the person to be examined and tested, to undergo counselling and to have restrictions placed on the person's behaviour or movements, including detention and isolation.

469. A person on whom a restriction or detention order, isolation order or interim isolation order is in force may apply to the Chief General Manager for a review of the order. The person may appeal to the Supreme Court against an order made by the Chief General Manager.

470. The Act also provides for compulsory testing for specified infectious diseases in circumstances where the disease may have been transmitted in an incident involving care-givers or custodians. There are also provisions for quarantine action in a proclaimed emergency which allow the Chief General Manager to restrict the movement of people. However, this proclamation may be revoked by further proclamation of the Governor in Council.

### Western Australia

471. In Western Australia, the Health Act 1911 and regulations made under that Act provide for the control of infectious diseases, including HIV. The Regulations provide for compulsory testing by a health official where a person is suspected on reasonable grounds to be suffering from a specified disease. The Act allows the Commissioner for Public Health, with the Minister's authorization, to order places and things to be isolated, quarantined and disinfected, and persons to be prohibited from leaving a place of quarantine until they have been examined. Further, a medical officer may order any person who is suffering from an infectious disease to be removed to a hospital if it is in the interests of public health or the person is without proper accommodation.

## Alcohol and drugs

472. Legislation exists in most jurisdictions empowering the detention of drug or alcohol intoxicated persons. Examples of this type of legislation follow. Queensland's legislative regime has been dealt with above in relation to mental illness.

### New South Wales

473. In New South Wales the Intoxicated Persons Act 1979 provides for the care and detention of intoxicated persons. A person who is found intoxicated in a public place and who is behaving in a disorderly manner, in a manner likely to cause injury to him or herself, another person or property, or needs to be physically protected because of his or her incapacity due to being intoxicated, may be detained and taken to a proclaimed place by a member of the police force or other authorized person.

474. A police station is a proclaimed place. However, an intoxicated person may not be taken to a police station unless there is no other available proclaimed place and it is impractical to take the person home, or on the grounds that the person's behaviour is too violent to allow him or her to be taken home or to another proclaimed place.

475. The detainee will be held at a proclaimed place until he or she ceases to be intoxicated or after the expiration of eight hours from detention, whichever occurs first, or may be released at any time into the care of a responsible person willing to undertake the care of the intoxicated person. A 1994 review of the Act recommended that the period of detention be extended, from the current maximum of 8 hours to up to 72 hours.

476. The Inebriates Act 1912 is also relevant. This Act is under review and may be repealed. The Act provides for an affected person either to enter into a recognizance to abstain from taking any intoxicating substance for a period of 12 months or more; to be placed under the care and control of a named person, at a specified address (house, hospital or institution) for up to 28 days; to be placed in a licensed institution or a state institution for up to 12 months; or to be placed under the care and charge of an attendant(s) or of a guardian for up to 12 months.

477. The court must personally examine an affected person and view a certificate from an involved medical practitioner that the person is an inebriate. Persons can be remanded for up to seven days for medical examination and those who escape from remand may be arrested and returned.

478. Orders made under the Act may be extended for up to 12 months on the order of a Supreme Court or district court judge.

### Northern Territory

479. The Police Administration Act allows for a police officer to take a person into custody when the police officer believes, on reasonable grounds, that the person is in a public place or trespassing on private property and is intoxicated with alcohol or drug. For this purpose, a police officer may,

without warrant, enter upon private property, may search the person and may remove for safekeeping any money or valuables found on the person. An intoxicated person may be held in custody only for so long as he or she remains intoxicated. However, if the intoxicated person was taken into custody after midnight and before 7 a.m., the person may be held until 7.30 a.m., notwithstanding that the person was no longer intoxicated. An intoxicated person taken into custody, and while in that custody, cannot be charged with or questioned about an offence, or be photographed or fingerprinted.

### South Australia

480. There is no legislation in South Australia empowering the detention of drug or alcohol addicted persons except insofar as they may be mentally ill within the meaning of the Mental Health Act 1993 (see further under Mental illness, above).

481. The South Australian Public Intoxication Act 1984 provides that persons in a public place under the influence of a drug or alcohol may be apprehended by a police officer or other authorized person. The police or authorized person must take the person home, to a place approved by the Minister for Health, to a police station or to a sobering-up centre. A person must be released from the police station or centre as soon as the person is capable of taking care of himself or herself. In the case of a police station this must be within 10 hours of apprehension and, in the case of a centre, 18 hours.

### Tasmania

482. The Alcohol and Drug Dependency Act 1968 provides for detention on application by patient, relative or welfare officer. A court may also make orders for detention in circumstances where a person is convicted of an offence punishable by imprisonment and the person committed such offence while under the influence of liquor. Patients may appeal to the Alcohol and Drug Dependency Tribunal and to the Supreme Court.

### Victoria

483. In Victoria, the Alcoholics and Drug Dependent Persons Act 1968 provides generally for the care and treatment of persons who are or who are likely to become alcoholics or drug dependent persons and for their rehabilitation into the community. Under the Act, an order may be sought from a magistrate by the husband or wife of the person complained against; by one of his or her parents; by a partner in business; by a brother, sister, son or daughter of full age; by a member of the police force of or above the rank of senior constable; or by a welfare officer. An order will be made if it appears to the court that the person is an alcoholic or drug dependent person. Such order would direct that the person complained against must be admitted to an assessment centre and remain there for seven days. If the medical officer in charge of the assessment centre so directs the order may be extended a further seven days.

484. At the end of the 7 or 14 day period, the person must be discharged, committed to a treatment centre or ordered by a court to remain in the assessment centre for treatment. A medical officer may commit to a treatment centre for treatment any person admitted to an assessment centre if two qualified medical practitioners have certified in writing that that person is an alcoholic or drug dependent person. A person committed to a treatment centre has a right to appeal against the order. In practice, patients usually volunteer for treatment.

### Western Australia

485. In Western Australia it is not an offence to be alcohol or drug dependent. However, under the Police Act, intoxicated people may be apprehended by the police and taken to an approved sobering-up centre. Where access to a sobering-up centre is not available, intoxicated persons may be detained in a police cell for up to eight hours.

## Unlawful non-citizens

486. Under the common law of Australia, aliens, i.e. non-citizens, who are in this country lawfully, or unlawfully, may not be detained except under and in accordance with some positive authority conferred by the law. Enemy non-citizens in a time of war are the one exception to this rule. Non-citizens have both standing and capacity to invoke the intervention of a court if they are unlawfully detained.

487. The High Court of Australia has consistently recognized the power of Parliament to make laws for the detention and removal of non-citizens. At present, the Migration Act 1958 (as amended) provides for a national regime of detention and removal of persons unlawfully in Australia. Under this legislation, non-citizens who are on Australian land or in Australian ports without a current visa are termed unlawful non-citizens.

488. Section 14 of the Migration Act 1958 defines an unlawful non-citizen as a non-citizen in the migration zone who is not a lawful non-citizen. Section 13 of the Act defines a lawful non-citizen as a non-citizen in the migration zone who holds a visa that is in effect. The migration zone is the area consisting of Australia itself and the sea within Australian ports. An allowed inhabitant of the Protected Zone (an area established by the Torres Strait Treaty) who is in a protected area in connection with the performance of traditional activities is also a lawful non-citizen.

489. Under the Migration Act 1958, an authorized officer (for example, a police, customs or immigration officer) must detain a person whom the officer knows or reasonably suspects to be an unlawful non-citizen. The officer must also detain a person outside Australia who is seeking to enter Australia without a current visa. An officer may detain a lawful non-citizen if he or she knows, or reasonably suspects that the non-citizen holds a visa which may be cancelled under certain provisions of the Migration Act 1958 and would attempt to evade the officer, or otherwise not cooperate with the officer's inquiries. A non-citizen detained for this purpose must be released within

four hours of being detained. If, at any stage, a non-citizen's visa is cancelled he or she must be detained as an unlawful non-citizen under section 189 of the Act unless granted a visa.

490. Unlawful non-citizens who are eligible non-citizens (non-citizens who have been immigration cleared or who belong to a prescribed class of persons (as detailed in the Migration Regulations)) may be eligible for a bridging visa (subclasses of temporary visas), providing temporary lawful status and allowing them to be released from detention. Unlawful non-citizens may apply for one of eight subclasses of bridging visas, although only one class, the Bridging E Visa, may be granted to detainees. Unauthorized boat arrivals may be eligible for a Bridging E Visa in certain circumstances on the basis of their:

> Age (children under 18 and persons over 75);
>
> Special need because of their health or previous experience of torture or trauma, where in the opinion of a medical specialist the person could not be properly cared for in a detention environment; or
>
> Being family members of an Australian citizen, Australian permanent resident or eligible New Zealand citizen.

491. In addition, where an unauthorized boat arrival who has applied for a protection visa has been in detention for more than six months without a primary decision having been made on the application, the minister may determine that that person is eligible for a bridging visa if he considers it to be in the public interest.

492. A Bridging C Visa may be granted where the applicant has not previously been detected as an unlawful non-citizen and makes a valid application for a further substantive visa (that is, a visa other than a bridging visa or a criminal justice visa), or for review of a decision to refuse a substantive visa. The Bridging C Visa provides lawful status until 28 days after the final determination of the visa application or subsequent review of the application.

493. A Bridging D Visa may be granted to unlawful non-citizens where:

> They have attempted to make a valid application for a substantive visa, but need more time to complete the making of that application (for example, to obtain the processing fee);
>
> They are unlawful non-citizens, are unable or do not wish to make a further application for a substantive visa (i.e. they wish to depart from Australia voluntarily and have reported to the Department of Immigration and Ethnic Affairs (DIEA) in order to avoid any sanction on return), and where there is no officer available who is authorized to determine that they need not be detained; or
>
> They have previously been refused a protection visa, they wish to make a further protection visa application and time is required to determine

whether they have new claims for refugee status. The Migration Act 1958 defines a Protection Visa as a visa, a criterion for which is that the applicant is non-citizen in Australia to whom Australia has protection obligations under the Convention relating to the Status of Refugees as amended by the Protocol thereto.

494. Unlawful non-citizens (including those in detention) may be eligible for grant of a Bridging E Visa (subclass 050) in a variety of circumstances, including where:

- They are making arrangements to depart Australia;
- They are pursuing merits review of a decision to cancel a substantive visa;
- They are seeking judicial review of a decision to refuse or cancel a substantive visa; or
- They are seeking to pursue a claim to remain in Australia, through other avenues (for example, pursuant to those sections of the Migration Act 1958 which allow the minister, acting personally, to substitute a more favourable decision).

495. The Migration Legislation Amendment Act (No. 5) 1995 allows the minister a non-compellable discretion to declare as eligible non-citizens' unauthorized arrivals who have applied for a protection visa and who have been in detention for six months from the time of application without a primary decision being made.

496. In the detention of an unlawful non-citizen, the detaining officer must immediately inform the detainee that he or she is being detained as an unlawful non-citizen under the Migration Act 1958 and must inform the detainee of the reason for this. In addition, detainees must be informed, as soon as practicable, of their right to apply for a visa, and of the time limits imposed for applying for a visa. They must also be informed by the detaining officer that they must remain in detention until either granted a visa or deported or removed from Australia. Legal assistance will be provided at the request of the detainee. However, section 193 of the Act provides an exception to the requirement to inform detainees of these matters and the exception primarily applies to detainees who do not have immigration clearance, or who have been detained before entering the migration zone.

497. If a detainee appears not to understand English, officers attempt to explain the reasons for detention in the first instance but must ensure that an interpreter fully explains them as soon as possible. Guidelines set out procedures for the use of interpreters. An interview is conducted to provide complete information to the detainee and set out his or her rights, if any, to remain in Australia. An interview record is completed according to the responses of the detainee, with copies attested to by the interviewing officer, the detainee and the interpreter.

498. Detention normally covers the period of the visa application determination, and any review of that determination, as well as the time

taken to organize removal of the unlawful non-citizen if his or her application has been refused. The Migration Act 1958 requires that removal take place as soon as reasonably practicable. Although the majority of persons dealt with under the Act are subject to only short periods of detention, the period of detention can vary from several hours to several years. The processing of applications lodged by persons in detention is given priority, but multiple applications and appeals by detainees can prolong their detention significantly. Difficulty in obtaining travel documentation to effect removal may also prolong detention. This may be due to delay on the part of the Government from which the documentation is sought or to the non-cooperation of the detainee in providing necessary identity information.

499. In the case of some unauthorized boat arrivals, varying periods of detention can occur where the arrivals are not eligible to apply for protection in Australia and arrangements need to be made for them to return to their home country.

500. More specifically, in relation to unauthorized boat arrivals, primary decisions on protection visa applications are made, on average, within six weeks of an application being made. The average period of detention, from time of arrival to protection visa grant or removal from Australia, is 15.5 weeks.

501. Each detainee in an immigration detention centre has a case officer responsible for ongoing management of his or her case. In addition, a detention review officer located in each of the DIEA regional offices is responsible for reviewing the detention details of each detainee every 30 days, or sooner in the case of an application for release by grant of a Bridging E Visa.

502. The legislative mechanism for review of detention is via an application for a Bridging E Visa. If a primary decision on a bridging visa application by a person in detention is not made within two working days, the bridging visa is deemed to be granted. Decisions to refuse a bridging visa are subject to expedited review by the Immigration Review Tribunal and a negative decision in that forum would be judicially reviewable by the Federal Court on questions of law.

503. Persons in immigration detention are advised in writing regarding the reasons for their detention, the arrangements made for the safe custody of their personal effects, access to medical treatment, access to visitors, media representatives and consular representatives and on general arrangements regarding the daily routine of the centre in which they are being held. Detainees are also able to request access to legal assistance. Care is also taken to temper any harshness by, wherever possible, exempting from detention dependent children and minors, bearing in mind the interests of the children and family concerned.

504. Terms relating to immigration clearance are defined in section 172 of the Migration Act 1958, which states that a person is immigration cleared if, and only if, the person:

Enters Australia; and

Complies with section 166 (which relates to evidence of a person's identity and possession of Australian citizenship or a valid visa); and

Leaves the port or prescribed place (otherwise than in immigration detention) at which the person complied with section 166, with the permission of a clearance officer; or

The person is refused immigration clearance, or bypasses immigration clearance, and is subsequently granted a substantive visa.

505. A person is in immigration clearance if the person is with an officer for the purposes of immigration clearance and has not been refused immigration.

506. A person is refused immigration clearance if he or she is with a clearance officer for the purposes of section 166 of the Act and either has his or her visa cancelled or refused, or is unable to provide the clearance officer with evidence or information required under section 166.

507. Further, every unlawful non-citizen has the right to seek a merits review of a decision to refuse the grant of a visa or to cancel a visa. The only exception to the review right is for non-citizens who are in immigration clearance, who have been refused entry to Australia and who are not applicants for refugee status. These people do not have access to merits review. Judicial review by the Federal Court of decisions taken by the reviewing tribunals is also available on the following grounds:

The required procedures were not observed;

The purported decision was made without jurisdiction;

The decision was not authorized by the Act or its regulations;

The decision was an improper exercise of power;

The decision involved an error of law;

The decision was induced or affected by fraud or actual bias; and

There was no evidence to justify the decision.

508. A further exception arises where the minister, acting personally and in the national interest, declares a person to be an excluded person under section 502 of the Migration Act 1958. Such a declaration precludes Administrative Appeal Tribunal review of section 200 criminal deportations and visa refusal or cancellation decisions under section 501 (on character

grounds) and merits review of protection visa refusal or cancellation decisions which rely on certain provisions of the Convention relating to the Status of Refugees. To date, this exception has not been used.

509. Lawful and unlawful non-citizens are discussed further in commentary under article 13, below.

Customs

510. The Federal Customs Act 1901 deals with the powers of customs and police officers to detain and search any persons whom they suspect of unlawfully carrying prohibited goods or internally concealing a suspicious substance. The powers of search are divided into three categories: frisk (which is restricted to customs officers only in certain designated international traveller clearance areas), external and internal. There are statutory guidelines for determining reasonable grounds in respect of frisk searches, and in any other case the test is reasonable grounds. The consent to any level of search - frisk, external or internal - must be properly informed consent. Lawful consent requires that the detainee be given a full and detailed explanation of his or her rights and the nature of the search to be conducted, in a language he or she can understand. Further, the officer must ensure that the detainee indicates (in writing for an internal search: orally or by their conduct for frisk and external searches) that they understand what is being proposed and consent to submit to each of the procedures being proposed. The right to refuse consent should be put to the person very clearly as well as the information that consent can be withdrawn at any time during the process. If there is any doubt as to the detainee's ability to clearly understand what is happening due to language difficulties, then an interpreter will be called in to ensure that the person is able to give properly informed consent.

511. There are various restrictions in relation to the carrying out of a frisk search. For example, it must be done as soon as practicable and by a customs officer of the same sex. A customs officer must give the person the option of having the frisk conducted in private. If a detainee refuses to have a frisk search or having submitted to a frisk search refuses to produce for inspection anything found as a result of the search, the provisions in relation to external searches apply.

512. In the case of an external search, which may involve the removal of some or all clothing, if there are reasonable grounds to believe that the detainee is not in need of protection or the detainee consents to be searched, then it must be carried out in a suitably private detention place as soon as is practicable. In any other case an application must be made to an independent justice of the peace or a senior customs officer for an order to carry out an external search. The use of reasonable and necessary force to conduct an external search is permitted but only where the circumstances of the reasonable grounds for detention have been reviewed and a search ordered by an independent justice.

513. The person making the order can only do so on being satisfied that there are reasonable grounds for suspecting that the detainee is unlawfully carrying prohibited goods. If the order is not made the detainee must be

released immediately. If an external search is ordered for a detainee who is under 17 years of age or otherwise in need of protection, the search must be carried out in the presence of the detainee's legal guardian or a person capable of representing the detainee's interests and, as far as is practicable, that person must be acceptable to the detainee.

514. The search must be conducted by a person of the same sex. Other statutory rights include the right to communicate with another person at any time, unless certain law enforcement circumstances apply, in which case the customs or police officer may stop such communication. Detainees may be questioned after they have been informed that they are not obliged to answer; but anything they do say may be used in evidence.

515. In the situation where a customs officer or a police officer suspects on reasonable grounds that a person is internally concealing suspicious substance (i.e. at least a traffickable quantity of narcotics), that person may be detained for the purposes of enabling an application for an order for detention to be made to a judge or magistrate. The detention officer must as soon as is practicable take the person to a detention place and, subject to certain conditions, detain the person. Generally, those conditions are that an internal search must be carried out by a medical practitioner at a place specified in the regulations (usually a hospital) or where technical paramedical and other services are available. An internal search may include an X-ray, ultrasound and/or physical examination of body cavities if necessary.

516. Arrangements for internal searches can be made provided the detainee is not under 17 years of age or otherwise in need of protection, and signs a written consent to be internally searched. The search must be conducted as soon as is practicable.

517. If the person does not consent or is in need of protection then an application for an order for detention must be made. The judge or magistrate must not make such an order unless satisfied that there are reasonable grounds for suspecting that the detainee is internally concealing a suspicious substance. Detainees have the right to be present at, to make submissions to, and to be represented before any hearing before the judge or magistrate. Depending on the judicial decision, the detainee must either be immediately released or can be detained for an initial period of 48 hours. If the detainee is in need of protection a person who, as far as is practicable, is acceptable to the detainee will be appointed to represent the detainee's interests. If the detainee has been detained beyond the initial 48 hours, and has not consented to a search, then an application must be made to a judge for an order for an internal search before the end of the detention period.

518. Other statutory rights while being detained for an internal search include the detainee being able to consult with a lawyer of his or her choice and being informed that there is no obligation to answer questions, however anything said may be used in evidence. The detainee may also talk to another person at any time, unless certain law enforcement circumstances apply, in which case the customs or police officer may stop such communication.

519. Additional statutory rights available to people being detained for any category of personal search include:

Customs or police officers must produce identification if requested;

Officers must not use more force or subject the person to greater indignity than is reasonable and necessary;

If detainees are not able to communicate with reasonable fluency in the English language or by other means, then interpreter facilities must be provided.

## Arrest

520. Under common law the purpose of an arrest is to bring the person before a court to be dealt with in accordance with the law. The arrest of a person can occur with or without a warrant. Arrest without warrant is the more usual and is dealt with below. The first section below deals with arrest without warrant under federal legislation. Arrest without warrant under state legislation is dealt with thereafter.

521. Under the Customs Act 1901, customs and police officers are granted limited powers of arrest in relation to persons suspected of smuggling or assaulting an officer in the execution of his or her duties. The Act, however, stipulates that, once arrested, a person "may be detained until such time as he can without undue delay be taken before a Justice". It is in the discretion of the justice to commit the person to further detention or admit him or her to bail pending a hearing.

### Federal matters

522. The Federal Crimes Act 1914 incorporates the principle of arrest being the sanction of last resort. The Australian Federal Police (AFP) have reinforced this principle in their administration in several ways: AFP supervisors now oversee the appropriateness of arrest practices; AFP officers are now not promoted on the basis of frequency of charges and arrests; and• processes have been adopted that do not encourage the use of arrest. A database is also kept to monitor progress against these standards.

523. Sections 8 and 8A of the Crimes Act 1914 provided a power of arrest without warrant. These sections have been repealed by the Crimes (Search Warrants and Powers of Arrest) Amendment Act 1994 (SWAP Act) which took effect from 1 December 1994. The SWAP Act inserts a new Part 1AA into the Crimes Act 1914. The amendments incorporate the recommendations of a review of federal criminal law chaired by an eminent Australian judge, the Right Honourable Sir Harry Gibbs GCMG, AC KBE, former Chief Justice of the High Court. With their precise provisions regulating when arrest without warrant is permissible, the amendments promote open administration and justice.

524. First, the amendments provide more restrictive power to effect a "citizen's arrest". A person who is not a police officer may, without warrant, arrest a person if he or she believes on reasonable grounds that the other person is committing, or has committed, an indictable offence and that

proceeding by summons would not achieve one or more of a number of specified purposes. Those purposes include ensuring the person's appearance in court, preventing a repetition or continuation of the offence, preventing the concealment, loss or destruction of evidence and preserving the safety or welfare of a person. Prior to the amendments, there was no requirement of belief on reasonable grounds that a summons would be ineffective.

525. Secondly, the Act provides that an officer may, without warrant, arrest a person for an offence if the constable believes on reasonable grounds that the person has committed or is committing an offence, and that proceeding by summons against the person would not achieve one or more of the specified purposes, some of which are outlined in the paragraph above.

526. The amendments also contain provisions dealing with arrest without warrant of persons on bail and the arrest of prisoners unlawfully at large. Other federal legislation also provides that people who are authorized under the legislation may make an arrest without a warrant for offences against that legislation. These provisions are usually carefully scrutinized to ensure that they comply with Federal Government policy in the Crimes Act 1914. The power of arrest of Australian Protective Service officers fits between those of ordinary citizens and the police; they may arrest for particular offences, whether or not indictable, under a number of Acts.

## Safeguards

527. The Crimes (Investigation of Commonwealth Offences) Act 1991 has introduced many safeguards for persons arrested in respect of federal offences. The Act inserts a new Part 1C in the Crimes Act 1914. Under the amendments, a person arrested by an "investigating official" can only be detained for a maximum of four hours of investigation before he or she must be brought before a magistrate. In serious and complex cases, he or she may be detained in police custody for further investigation for up to another eight hours, with the consent of the magistrate. Before being questioned, a person must be warned against self-incrimination. The arrested person has a right prior to being questioned to communicate with a friend or relative to inform that person of his or her whereabouts. The person also has the right to communicate with a legal practitioner of his or her choice and to arrange for the practitioner to be present during questioning. Interpreters must be made available if required by the detained person.

528. Additional safeguards exist for Aboriginal and Torres Strait Islander peoples, including the presence of an interview friend and an interpreter during any interview and, where the person is arrested, notification to a representative of an Aboriginal legal aid organization. See further commentary in relation to article 14 below.

## Extradition

529. Procedures governing extradition are found in the Extradition Act 1988. The Act provides that a person arrested under a provisional arrest warrant must be brought before a magistrate as soon as practicable to be remanded in custody (or on bail) to await proceedings to determine eligibility for extradition. Bail is to be granted in special circumstances only.

530. The Attorney-General may order the release of a remandee at any time. In any case, the remandee must be released or discharged from bail after 45 days, subject to any relevant treaty provisions and to the magistrate's discretion to extend the period of remand if proceedings to determine eligibility for extradition have not begun.

531. The remandee has a number of rights in relation to the hearing before a magistrate concerning eligibility. He or she has the right to be present during the determination of eligibility, to be represented at that meeting and to present argument that the documentation tendered by the requesting country in support of the extradition request is incomplete or invalid.

532. Where a person consents to extradition, or is determined eligible for extradition, the person is committed to await a surrender determination by the Attorney-General who must make that determination as soon as reasonably practicable. If the Attorney-General determines that the person is to be surrendered, the Attorney-General will issue a warrant authorizing that the person be placed in the custody of a foreign escort officer and transported out of Australia. Otherwise the Attorney-General will order the release of the person.

533. In the case of an adverse finding on extraditability by a magistrate, a detainee may appeal against the decision to the Federal Court or to the relevant state supreme court. The detainee may also have recourse to the prerogative writs of mandamus, prohibition and injunction, original jurisdiction over which is vested in the High Court.

534. Since the submission of Australia's previous report under the Covenant, the number of people annually extradited from Australia has ranged from 2 to 16.

### State matters

535. Police officers in all state jurisdictions are authorized by legislation to arrest persons without a warrant if they find a person committing an offence. In most jurisdictions this power is also granted to members of the public. Police officers may also arrest without a warrant if they have reasonable grounds for believing a person to have committed any offence (but, in Victoria, only if it is an indictable offence and, in the Australian Capital Territory, only if it is considered that proceeding by summons against the person would not be effective). In some jurisdictions (for example, the Northern Territory, South Australia and Western Australia), police officers may also arrest without warrant if they have reasonable grounds for believing a person to be about to commit an offence.

536. In addition to the criminal and police legislation described below, special purpose legislation in each jurisdiction confers on police powers of arrest in limited circumstances.

### Australian Capital Territory

537. Under the Crimes Act 1900 any person may, without warrant, apprehend a person who is in the act of committing or who has just committed any offence.

The Act provides that the person must be taken to a police officer as soon as practicable. The Act also provides that a police officer may, without warrant, arrest a person for an offence against a law of the Territory if the police officer believes on reasonable grounds that the person has committed or is committing the offence, and that proceeding by way of summons against the person in respect of the offence would not achieve one or more of a number of purposes. These are: ensuring the person's appearance before the court; preventing the continuation or repetition of the offence or some other offence; preventing the concealment, loss or destruction of evidence; preventing harassment of, or interference with, a person who may be required to give evidence in proceedings in respect of the offence; preventing the fabrication of evidence to be given or produced in proceedings in respect of the offence; or preserving the safety or welfare of the person.

538. The Magistrates Court Ordinance 1930 regulates the provision of warrants. It provides that a magistrate may issue a warrant for the arrest of a person if information has been laid against the person and the matter is substantiated by the oath of the informant or a witness. Also, a magistrate may proceed by summons against the person if he or she thinks fit. A warrant need not be returnable at any particular time, but may remain in force until executed.

### New South Wales

539. Under the Crimes Act 1900, anyone may, without warrant, apprehend any person who is committing, or who has just committed, an offence. The powers of arrest of a police officer are broader. A constable may, without warrant, apprehend any person whom he or she, with reasonable cause, suspects of having committed any offence or crime, including a crime of intent and breaches of the Summary Offences Act 1988. However, the Commissioner's instructions to the police provide that as a general principle arrest must be treated as a sanction of last resort. Detention in police custody must only occur after all available alternatives have been considered e.g. infringement notices, court attendance notices etc.

### Northern Territory

540. In the Northern Territory, statutory police powers of arrest are detailed in the Police Administration Act 1979. The Act provides that a police officer may, without a warrant, arrest and take into custody a person who the officer believes has committed, is committing or is about to commit an offence.

541. Section 121 of the Police Administration Act 1979 provides for the issue of an arrest warrant by a justice of the peace pursuant to an application alleging that there are reasonable grounds for believing that a person has committed an offence. Section 124 of the Act provides that where a police officer does not have the issued warrant in his or her possession, the officer may arrest and take into custody any person he or she has reasonable cause to believe is a person for whose apprehension or committal a warrant has been issued. The police officer has an obligation to produce to the person the warrant authorizing the person's apprehension or committal as soon as is reasonably practicable. Section 123 of the Act provides that a

member of the police force may, without a warrant, arrest and take into custody any person where he or she believes that person has committed, is committing or is about to commit an offence.

542. Prior to arresting an interstate offender, police must believe on reasonable grounds that the person has committed an offence interstate and that there is a similar Northern Territory offence punishable by imprisonment for a period exceeding six months.

### Queensland

543. It is also the policy of the Queensland Police Service to use the power of arrest as a last resort. Legislation outlines the circumstances in which an offender may be arrested without warrant. The Queensland Criminal Code has general provisions concerning arrests without a warrant, and various other statutes outline an equivalent power. For example, the Traffic Act enables the arrest without warrant of offenders against specified sections of that Act. The Criminal Code also contains restrictions on police behaviour during arrests. While resistance to arrest is unlawful, police transgression of statutory power will amount to assault and the person being arrested is entitled to reasonable self-protection.

544. In 1993 the Queensland Criminal Justice Commission released three volumes and in 1994 the remaining two volumes of their report reviewing police powers in Queensland. Volumes I, III and IV are most relevant to this article. Volume I provides a general overview of existing police powers in Queensland. Volume III is concerned with the powers of police to arrest without warrant, demand a person's name and address, and to move people on. Volume IV relates to the questioning and detention of suspects.

545. The recommendations contained in the report reflect two broad principles: first, that police powers should only be increased where the need to do so has been demonstrated; and, secondly,that at all times increased accountability should accompany any increase in police powers.

546. The Parliamentary Criminal Justice Committee conducted private and public hearings into the recommendations contained in the report. The Committee released its findings on 12 May 1995 and recommended that police powers be consolidated into a police powers and procedures bill. The Queensland Government has not yet responded to the Parliamentary Committee's report.

### South Australia

547. In South Australia, the general power of arrest is found in the Summary Offences Act 1953, which provides that:

> "A member of the police force, without any warrant other than this Act, at any hour of the day or night, may apprehend any person whom the member finds committing, or has reasonable cause to suspect of having committed, or being about to commit, an offence."

548. The Act further provides that the police can arrest a person whom they reasonably believe to be a person against whom a warrant has been issued.

Tasmania

549. Under both the Criminal Code 1924 and the Police Offences Act 1935, members of the public may arrest without warrant. This power arises where a person is found committing particularly offences which involve substantial injury to another person.

550. Police officers may arrest without warrant in specified circumstances under the Criminal Code 1924. Police officers may arrest a person found committing any crime and persons reasonably believed to have committed specified crimes.

551. Remedies available for wrongful arrest and detention are available both administratively and through the courts. An aggrieved person may complain to the Police Department, upon which an internal investigation may be launched. Civil remedies are also available in an action in tort for false imprisonment, assault and battery and other trespass to the person.

Victoria

552. The powers of arrest are contained in the Crimes Act 1958. Any person may arrest without warrant:

> A person found committing any offence (if the arresting person believes that the arrest is necessary to ensure the appearance of that person before a court, preserve public order, prevent further offences occurring or for the safety or welfare of the public or the offender);
>
> If instructed to do so by a police officer who has power to apprehend under the Act; or
>
> A person he or she believes on reasonable grounds is escaping from legal custody or avoiding apprehension.

553. Where a person is arrested while committing a summary offence there is a statutory obligation to release the offender once the reason for the arrest no longer continues.

554. In addition to the above powers of arrest, a police officer may arrest a person he or she believes on reasonable grounds has committed an indictable offence (as defined under Victorian law).

555. The Victoria Police Operating Procedures Manual provides that police officers in Victoria should avoid arrest where proceeding by summons is appropriate. In cases where arrest is necessary, the Operating Procedures Manual provides that the officer must not use excessive force or humiliation. The utmost opportunity should be given the person to explain the basis of his or her actions leading to the arrest, and the arrested person should be treated with courtesy and consideration.

## Western Australia

556. In Western Australia, powers of arrest are given to the police under the Police Act 1892 and the Criminal Code. Both Acts give a constable power to arrest without warrant "all persons whom he shall have just cause to suspect of having committed or being about to commit any offence". In 1992, the Western Australia Law Reform Commission completed a review of police powers contained in the Act. Its report recommended a better balance between providing the police with adequate powers and the need to prevent unnecessary intrusions on civil liberties. The Western Australian Government is currently drafting a bill to implement substantially the recommendations of the Commission.

557. Police Routine Orders provide instructions that the person being arrested is to be told of the reasons for arrest. The Police Lockup Management Manual provides that a police officer who is an authorized police officer under the Bail Act 1982 must:

> Consider each prisoner's case for bail as soon as practicable; and
>
> Ensure that no person is detained unnecessarily.

558. Persons in custody are considered for bail under the provisions of the Bail Act 1982. If they remain in custody, they must be brought before a court as soon as practical. They are released on a date within seven days of the day on which they are arrested. Remandees will generally be held in a detention centre.

559. Details of the charge contained in the complaint are put to the detainee when he or she appears in court. Other than the giving of reasons for the arrest, there is no requirement in law or in internal instructions for the detainee to be told of the exact charge. In practice it is rare for a prisoner not to be told of the exact charge he or she is facing.

560. Bail must be considered for all detainees. Bail may be refused if it is felt that witnesses may be interfered with, evidence disturbed, the detainee may re-offend, the detainee may not answer to bail or he or she needs to be kept in custody for his or her own protection.

## Reasons for arrest

561. Under the common law, an arrest (whether by a police officer or an ordinary citizen, and with or without a warrant) is unlawful unless reasonable efforts are made to communicate to the person the grounds upon which the person is being arrested. No particular form of words is required. However, the grounds need not be communicated if the person arrested ought, by reason of the circumstances in which the arrest occurs (for example, in the course of committing the offence), to know the substance of the offence for which he or she is being arrested, or if the person arrested, by his or her behaviour, makes it impracticable for the communication to take place. On one view, this rule may have been qualified in certain jurisdictions by the legislative requirements that notice of the reason for the arrest must be given "if practicable". The better view, taking into account the reluctance

of courts, when interpreting legislation, to read down common law rights, appears to be that the words "if practicable" should be read narrowly and limited to where the person arrested makes communicating impracticable.

562. Some jurisdictions have codified the principles stated in the above paragraph, for example, in the Crimes (Search Warrants and Powers of Arrest) Amendment Act 1994 in relation to federal offences. In other jurisdictions such as South Australia, the common law has been restated in police standing orders.

563. An officer who makes an unlawful arrest may be liable to disciplinary proceedings or civil action for damages. Action may also be taken under complaints against the police legislation and evidence obtained subsequent to the arrest may be held inadmissible in a court.

Prompt information of charges

564. Arrest is normally followed by the formal charging of the person arrested at a police station. Charging is where the person is advised of the nature of the charge or charges.

565. In relation to federal offences, the Crimes (Search Warrants and Powers of Arrest) Amendment Act 1994 provides that a person must inform the other person of the offence for which he or she is being arrested at the time of the arrest. However, in Western Australia, other than the giving of reasons for the arrest there is no requirement in law or police regulations for the detainee to be told of the exact charge prior to appearance in court. In practice, however, it is rare for a prisoner not to be told of the exact charge he or she is facing.

566. In the case where a person is not arrested but proceeded against by summons, the prescribed court documents that must be issued before the matter can be brought to court (information, complaint, summons etc.) must specify the offence or offences with which the person is charged. This necessarily involves referring to the basic details of the offence, but not such information as the name of persons having supplied information leading to the arrest. The accused is served with a copy of such documents.

567. Both police and the courts make considerable use of interpreters where accused persons are unable to understand or to communicate effectively in the English language. The use of interpreters and other aspects of the criminal process are dealt with in more detail in regard to article 14.

Third party presence

568. A relative, friend or lawyer is normally contacted immediately after arrest and prior to questioning. Federally, these rights are guaranteed by the Crimes Investigation of Criminal Offences Act 1991 and this Act inserted the relevant provisions into the Crimes Act 1914 (Part IC).

569. In South Australia a person who has been arrested has a right to make one telephone call to a nominated friend or relative; a right to have a solicitor, relative or friend present during any interrogation; and a right to an interpreter if English is not the person's native language.

570. Under the Victorian Crimes Act 1958, an investigating official, before commencing any investigation or questioning of a person, must inform the person of his or her right to communicate with a friend, relative or legal practitioner and must defer questioning or investigation for a reasonable time to enable the person to make or attempt to make the communication. There is an exception to this requirement where the investigating official believes on reasonable grounds that the communication would result in the escape of an accomplice or the fabrication or destruction of evidence, or the questioning or investigation is so urgent, having regard to the safety of other people, that it should not be delayed. In relation to persons under the age of 17, (subject to certain exceptions), an investigating official cannot investigate or question a person unless a parent, guardian or independent person is present and, before the commencement of any questioning or investigation, the official has allowed the person to communicate with his/her parent, guardian or an independent person. Where a person in custody does not have sufficient knowledge of English to understand the questioning, the Victorian Crimes Act requires an investigating official, before any questioning or investigating commences, to arrange for a competent interpreter to be present and to defer the questioning or investigation until the interpreter is present.

### Prompt appearance before a judicial officer

571. The common law principle that an arrest becomes unlawful if there is an unreasonable delay in taking the suspect before a justice or magistrate to be dealt with according to law applies, as such, in some jurisdictions and has been incorporated by legislation in others. Some of this legislation sets time periods within which this action is to occur (for example, four hours for serious offences in South Australia, four hours in relation to federal offences except if the arrested person is a person of Aboriginal or Torres Strait Islander descent and not reasonably believed by the officer to be of ordinary education or understanding, in which case the relevant time is two hours). In other jurisdictions, where no time period is set, the requirement to avoid unreasonable delay applies. Generally people in police custody have to be presented before a magistrate as soon as is practicable. In determining whether a person was detained beyond this time, the court will balance the public interest with the interests of the accused. In practice, people are generally brought to court within 24 hours, unless a public holiday intervenes between the day of arrest and the resumption of court hearings.

572. In Tasmania the Criminal Law (Detention and Interrogation) Act 1995 provides that an arrested person may be detained by a police officer for a reasonable time for the purposes of interrogation before being brought before a court, where a bail application may be made. The Act sets out a number of matters that a court is required to take into account in determining what constitutes a reasonable time. The Act also sets out the rights of an arrested person whilst in police custody.

## Entitlement to trial within a reasonable time

573. Where the accused pleads guilty to a charge, there is normally no delay in the court disposing of the matter. Where the accused defends the charge, delays of some months (i.e. beyond the time needed by the accused to prepare his defence) may occur before the case is heard because of the heavy caseloads in the courts. However, once the complaint or indictment is filed the matter takes its place in the list of cases awaiting hearing. The hearing may thereafter only be delayed, at the instance of the prosecution or defence, by the exercise of judicial discretion.

574. The provision of the Imperial Habeas Corpus Act 1679 (or its equivalent) in all Australian jurisdictions, as well as supplementary legislation (in Bail Acts) in most jurisdictions, provide that a person must be released on bail, or discharged altogether, if not brought to trial within a certain period. For further discussion on this subject, see the commentary under article 14 below.

## Bail

575. Bail is usually governed by state law and these laws apply to persons charged with federal offences pursuant to the Judiciary Act 1903. Bail laws in all jurisdictions enable release of a person pending the hearing of the charge against the person by a court. Two types of bail are generally available - bail determined by an authorized police officer and bail granted by a court. The accused person may be required to enter into a recognizance, with or without surety or sureties, and to comply with such conditions as would ensure his or her appearance at court at the time and place specified. If the applicant is refused bail by a police officer, he or she may apply for bail again when appearing before the court, or may so apply at any time before the Supreme Court.

576. Most jurisdictions have a legislative presumption in favour of bail except for serious offences such as armed robbery, drug trafficking or failure to appear in accordance with a bail undertaking. People charged with these offences will not automatically be refused bail but will find it more difficult to secure their release. In the Australian Capital Territory for example, the Bail Act 1992 creates a right to bail for minor offences punishable by no more than six months jail or a fine only (except for domestic violence offences) and creates a rebuttable presumption in favour of bail in most other cases. However, in South Australia, the Bail Act 1985 does not differentiate between offences; there is always a presumption in favour of bail.

577. All States have passed comprehensive bail legislation in recent years to update and consolidate existing bail laws. The legislation generally lists the factors relevant in the exercise of discretion by a bail authority to grant bail, the conditions which may be imposed on a grant of bail and the procedures to be followed by the police and the courts in the determination of bail.

578. The relevant factors in making a determination as to the grant of bail to an accused person generally include such matters as:

> The probability of the accused appearing to face the charges, taking account of the person's community ties, previous history and the circumstances of the offence;
>
> The interests of the accused, in regard to the period he or she may have to spend in custody, and the accused's need to be free for any lawful purpose; and
>
> The protection and welfare of the community, including the likelihood of the person interfering with the evidence, witnesses or jurors or the likelihood the accused will or will not commit an offence while at liberty on bail.

579. The codification and expansion of the conditions which may be imposed in relation to the grant of bail, as found in the new legislative schemes, were in part the result of concern that a bail system based on purely financial conditions was not equitable, particularly in regard to low income groups within the community. As a consequence of the downgrading of financial means as a factor and the use of money or surety as a bail condition, the legislative schemes now create a punishable offence if the accused fails to appear to answer the charge.

580. Since the previous report, the Bail Act 1985 in South Australia was amended so that children (i.e. people under 18 at the time the offence was allegedly committed) can apply for bail.

581. In relation to unlawful detention, the writ of habeas corpus is available in jurisdictions to challenge the lawfulness of the detention of a person. Persons who have been unlawfully arrested or detained also have a right of action for damages at common law. Such action lies against the person occasioning the arrest or detention. In some states there is no statutory right to compensation for unlawful arrest or detention. However, courts are empowered to award costs to defendants in cases where the charges against them have been dismissed.

Prisoners

582. In Australia, there is no national correctional prison system. Each state is responsible for its own correctional prison system. The Australian Capital Territory operates a remand centre only and Territory and federal offenders sentenced in the Australian Capital Territory are transferred to New South Wales to serve their sentences. Section 120 of the Australian Constitution requires states to hold persons in custody who are remanded, convicted or sentenced in relation to federal offences. This section has also been interpreted as requiring states to provide punishment for federal offenders.

583. The imprisonment rate in Australia overall is relatively low when compared with rates in many other countries. However, there has been a gradual increase in the national imprisonment rate, particularly for male

prisoners, as shown in table 5. As at June 1994, the national imprisonment rate was 230 (prisoners per 100,000 adult male population) compared with 181 in June 1985.

584. In relation to remandees (unconvicted prisoners) there was an increase from 8.5 to 11.6 per cent of the total prisoner population from 1982 to 1991 and this issue is discussed further below. Table 6 shows the percentage of prisoners by jurisdiction and legal status as at June 1982 and June 1993.

585. Other notable trends observed in the Australian annual prison census over the period 1982-1993 include:

- The proportion of female prisoners increased from 3.4 to 4.8 per cent of all prisoners;
- Overseas born prisoners comprised approximately 20 per cent of the total throughout this period;
- The proportion of prisoners sentenced to under one year increased from 26.7 to 28.8 per cent, and the proportion sentenced to over five years decreased from 37.4 to 32.4 per cent; and
- Offences leading to imprisonment changed a little, for example persons convicted of homicide declined from 10.8 to 9.4 per cent, persons convicted of other offences against the person increased from 30.7 to 36.9 per cent, and those convicted of property offences declined from 34.6 to 28.6 per cent.

586. Aboriginal and Torres Strait Islander peoples continue to be heavily over-represented in statistics for the criminal justice system. In August 1992, Aboriginal and Torres Strait Islander peoples, who comprise 2 per cent of the Australian population, comprised 29 per cent of those taken into police custody and held in police cells. A 1994 national survey revealed that, among indigenous persons aged 13 and over, one in five had been arrested at least once in the past five years (see table 27 for an analysis by jurisdiction). For males aged between 20 and 24, the proportion was almost one in two. Of those who had been taken away from their families as children (one in 10 of those aged 25 and over), 32 per cent reported being arrested in the past five years, compared with 19 per cent of those not taken away.

587. Aboriginal and Torres Strait Islander peoples are over-represented by a factor of 15 in Australian prisons. Trend figures for the period 1982-1993 show that prisoners identified as Aboriginal accounted for about 15 per cent of all prisoners. At 30 June 1992, one in seven prisoners was an Aboriginal person or Torres Strait Islander. The level of Aboriginal representation is prisons was highest in Western Australia, where an Aboriginal person was about 22 times more likely to be in prison than a non-Aboriginal person. Tables 7, 8 and 13 show Aboriginal and Torres Strait Islander prisoners in custody, imprisonment rates and over-representation in the period 1988-1994.

588. The Aboriginal prison population in New South Wales has doubled between 1989 and 1994 (from 385 to 788, see table 7). In all jurisdictions except Western Australia the percentage of the prison population which is Aboriginal has increased (see table 8).

## Prison population trends

589. Since 1982 the prison population in Australia has increased by about one third, however, this increase has not been uniform in all jurisdictions. In New South Wales the prison population increased by about 75 per cent and in South Australia the increase was about 25 per cent. There are some notable fluctuations within some of the jurisdictions. For example, in South Australia the imprisonment rate dropped by over 27 per cent between 1983 and 1984, and in Queensland the imprisonment rate in 1987 was 120 per 100,000 of the adult population, while in 1993 the rate was down to 89 (see table 9). Tables 10 and 11 show the numbers of sentenced prisoners and rates per 100,000 of the adult population respectively for each jurisdiction for the years 1982 to 1993.

## Variations between the states

590. The variation in imprisonment rates between states is shown in table 9 and highlighted in Prison population trends, above. It is not obvious why the Northern Territory, New South Wales and Western Australia have significantly higher imprisonment rates than other Australian jurisdictions. While the level and types of crime vary across jurisdictions, it is difficult to establish a direct link between crimes reported/becoming known to the police and the imprisonment rate. As discussed under article 14, Judiciary, below, the judiciary in each Australian jurisdiction is independent. The variation in imprisonment rates may partly be explained by differences in sentencing legislation and sentencing practices between jurisdictions.

591. Table 12 shows the number of sentenced prisoners received in each jurisdiction during June 1994 and the imprisonment rate. The Northern Territory, New South Wales and Western Australia again show higher imprisonment than other jurisdictions.

592. The high numbers of prisoners in the Northern Territory and Western Australia may be due partly to the larger Aboriginal population in these states and their very high rates of imprisonment. Table 13 shows the ratio of over-representation of Aboriginal prisoners compared to non-Aboriginal prisoners. The imprisonment rate in the Northern Territory is also affected by the youthfulness and high male ratio of its population.

593. Although New South Wales and Victoria have very similar populations, levels of urbanization, crime rates and criminal justice structures, an adult in New South Wales has almost twice the chance of being in prison as his or her Victorian counterpart. As shown in table 9, the imprisonment rate of New South Wales in 1993 is two and a half times that of Victoria. The higher prison population rate in New South Wales is partly a result of different sentencing policies. In New South Wales, periodic detention is an option which contributes to the overall sentenced prisoner population. Also, New South Wales makes greater use of imprisonment for fine defaulters,

whereas Victoria imprisons very few fine defaulters. However, when periodic detention and the imprisonment of fine defaulters are excluded, the population difference appears to be partly because New South Wales prisoners spend longer in custody, but mainly because sentenced prisoners are received into custody at a much greater rate than in Victoria.

594. However, due to the lack of nationally comparable data, it is not possible to determine whether New South Wales prisoners spend longer in custody than Victorian prisoners because New South Wales courts impose longer terms of imprisonment for comparable offences, or because New South Wales courts deal with a more serious profile of offender. In addition, the New South Wales Sentencing Act 1989 has had the effect of increasing periods spent in custody by prisoners and therefore the size of the prisoner population. The Sentencing Act 1989 is discussed further under article 15, Sentencing, below.

### Remandees

595. As discussed in that section, legislation in all Australian states reflects the view that as a general rule persons awaiting trial should not be detained in custody. Provision is made for such detention in cases where the alleged offender is thought to pose a danger to others, where there is some likelihood that he or she may abscond before trial unless detained in custody or where there is a risk of interference with witnesses. These exceptions should not produce a situation where a large proportion of prisoners are in fact detained in custody awaiting trial.

596. However, in practice the remand population of prisons has crept up over the years and increases in remandee numbers are greater than the overall increase in prisoner numbers.

597. Between 1982 and 1993 the rate of remandees (see table 14) in Australia has increased by almost 55 per cent. Although their number has increased in every jurisdiction, such increase has not been uniform. In the Northern Territory, for example, the rate of remandees increased very sharply in 1985 and 1986 but it declined equally sharply in the following years, and indeed this rate in 1993 was lower than that in 1982. Table 15 shows the number of remandees on census day of each year from 1982 to 1993.

### Review of detention

598. For a person deprived of liberty, the writ of habeas corpus, to which reference has been made earlier in this report, is available to challenge the lawfulness of the detention. The writ can be sought to establish that a person is wrongly detained, for example, in a goal or a police station on a purported criminal charge, or where a parent or guardian is unlawfully holding a child under restraint, or where a person is detained in a mental hospital. A relative, guardian or friend may apply to a court on the detained person's behalf. Unless the detention is shown to be lawful, the person detained will be released forthwith from detention.

599. The writ may also be used where bail is being unreasonably obstructed, or where the amount of security demanded is so excessive that it amounts, in effect, to a refusal to grant bail (see R v. Rochford: Ex parte Harvey (1967) 15 FLR 149).

## Right to compensation

600. A person who has been unlawfully arrested or detained has an enforceable right to compensation under the common law actions of malicious prosecution and false imprisonment. False imprisonment is an action in trespass to the person which is committed when the voluntary act of one person directly subjects another to total deprivation of freedom of movement without lawful justification. The tort provides a remedy to an individual against those responsible for the detention. Proof of damage is unnecessary because "[t]he law attaches supreme importance to the liberty of the individual and if he suffers a wrongful interference with that liberty it should remain actionable even without proof of special damage" (Murray v. Ministry of Defence [1988] 2 AII ER 521). Accordingly, a person who has been unlawfully detained may claim damages, including exemplary and aggravated damages.

601. In December 1992 the Federal Parliament amended the Migration Act 1958 to limit the effect of a High Court decision which had given rise to a number of claims for compensation for unlawful imprisonment by unlawful non-citizens. The amendments were intended to reflect the view of all parties that the detention was in fact lawful. In effect, the amending legislation extinguished a person's right of action for damages for false imprisonment as a result of being unlawfully detained pursuant to the Migration Act 1958 and substituted a statutory right of damages of one dollar per day. As a result of a subsequent judicial decision, the amending legislation which abolished a person's common law right to damages for false imprisonment was repealed.

## Aboriginal deaths in custody

602. The Royal Commission into Aboriginal Deaths in Custody, established in 1987, was commissioned jointly by the federal and state governments in response to concerns by Aboriginal and non-Aboriginal people that many of the Aboriginal deaths in custody were the result of misconduct by police and prison officers.

603. The final report of the Royal Commission was tabled in Federal Parliament on 9 May 1991. The Royal Commission investigated the deaths in custody from 1 January 1980 to 31 May 1989 of 99 Aboriginal and Torres Strait Islander people. It found that the deaths were not caused by deliberate violence or brutality by police or prison officers. However, the commissioners criticized the care of persons in custody and noted the generally poor standard of care. The Royal Commission also found that the principal explanation for the high numbers of Aboriginal and Torres Strait Islander deaths in police and prison custody was the over-representation of these people in both forms of custody. An examination of the 99 Aboriginal deaths in custody revealed that in every case their Aboriginality played a significant and, in most cases, a dominant role in their being in custody and

dying in custody. The final report made 339 recommendations which cover diverse areas ranging from the police, prisons and criminal justice system to Aboriginal and Torres Strait Islander social and health issues. Many are also directed to Aboriginal and Torres Strait Islander communities and organizations, local authorities and the media. The Commission's recommendations also relate to other current initiatives and activities, including:

The Commonwealth/state relations initiative - including reviews of Commonwealth/state financial arrangements and the coordination of services for Aboriginal and Torres Strait Islander peoples;

The National Aboriginal Health Strategy (see under Aboriginal and Torres Strait Islander peoples' health, article 6, below); and

The report of the National Inquiry into Racist Violence (see under article 20, above).

604. All governments cooperate in a programme of monitoring the implementation of these recommendations. The Federal Government reports on action in its jurisdiction, collects and publishes data on custody and deaths, and develops policies and actions for change in procedures, operating instructions and practices with the states. States also provide annual implementation reports. Aboriginal Justice Advisory Councils have been established in each jurisdiction in accordance with the recommendations of the Royal Commission (recommendations 2 and 3). A National Aboriginal Advisory Justice Council has also been established.

605. In responding to the report, the Federal Government agreed that the Aboriginal and Torres Strait Islander Commission (ATSIC) would be responsible for the annual reporting on the implementation by the Federal Government of recommendations. The Australian Institute of Criminology is responsible for reportinbg annually to the Australian Parliament on trends in deaths in custody. Each state government also produces an annual report on its implementation of the Royal Commission's recommendations for which it is responsible. A community body, the Aboriginal Justice Advocacy Committee also monitors the implementation of the recommendations and promotes their implementation.

606. The report's first recommendation emphasized the need for consultation with Aboriginal and Torres Strait Islander organizations and the use of them to implement recommendations. The Federal Government fully supported this recommendation.

607. Much of the effort to implement the first recommendation in 1992-1993 has gone into establishing comprehensive arrangements to monitor and report on the implementation of the Royal Commission recommendations for which the Federal Government has responsibility. To date monitoring and reporting mechanisms have required:

Coordination between the federal and state governments;

Monitoring of implementation by a total of 24 federal departments and agencies;

Arrangements to obtain a report on implementation of each recommendation for which there was a federal responsibility;

Arrangements to obtain a report on each of the funded programme initiatives which had been developed in response to Royal Commission recommendations;

An assessment of "progress of the implementation of the adopted recommendations ..." (part (b) of recommendation one); and

A consistent focus on ensuring the maximum involvement possible of Aboriginal and Torres Strait Islander peoples in all aspects of the implementation and monitoring processes.

608. The annual reports by the Federal Government on the implementation of the recommendations of the Royal Commission are distributed widely, including to all ATSIC regional councillors and commissioners, to upwards of 2,000 Aboriginal and Torres Strait Islander organizations throughout Australia and to the public through the information services of departments and agencies.

609. The Royal Commission found that the largest number of indigenous people in police lock-ups were in protective custody having been found very drunk in public in jurisdictions where drunkenness has been decriminalized. Further significant numbers were in police lock-ups for drunkenness in jurisdictions where this has not been decriminalized. In response the Royal Commission recommended, inter alia, the decriminalization of public drunkenness and the establishment of adequately funded non-custodial facilities for the care and treatment of intoxicated persons (see recommendations 79 to 85).

610. Public drunkenness was decriminalized in the Northern Territory in 1974, in New South Wales in 1979, in the Australian Capital Territory in 1983, in South Australia in 1984 and in Western Australia in 1989. Victoria and Queensland have not decriminalized public drunkenness. In Tasmania, people can still be arrested when incapable of taking care of themselves.

611. During 1994 the House of Representatives Standing Committee on Aboriginal and Torres Strait Islander Affairs conducted an inquiry into the implementation by governments of the recommendations. The Committee issued its report, "Justice under scrutiny", in November 1994. The Committee concluded that the implementation of the recommendations relating to diversion of intoxicated people from police custody was uneven. Sobering up centres have been established in South Australia (five), Queensland (one, with three additional facilities planned), Victoria (two), Western Australia (five, with consideration of an additional four facilities under way), and the Australian Capital Territory (one). The Northern Territory night patrols have been effective in keeping people out of police custody. However, the report also noted that two jurisdictions had not decriminalized public drunkenness, and documented evidence of increasing numbers of police

detentions for intoxication in one jurisdiction and a lack of police awareness of alternatives to detention in police lock-ups in other jurisdictions.

612. The Federal Government's jurisdiction in the areas of imprisonment, arrest and detention is extremely limited as most police, juvenile detention centres and courts fall within the jurisdiction of the states. The then Federal Government wrote to the relevant state ministers in relation to these issues. However, the Federal Government has played a role in the areas of education and training of police, prison officers, court and judicial officers and the introduction of a computerized charging system which will enable better monitoring of arrests and charges.

613. Recommendations 86 to 88 of the Royal Commission deal with diversion from police custody, including that offensive language not be the occasion for arrest or charge, that arrest should be the sanction of last resort in both principle and practice and that community policing principles be encouraged.

614. The "Justice under scrutiny" report documents uneven implementation of these recommendations in all jurisdictions. The Federal Minister for Justice has referred the report to the Australasian Police Ministers' Council, through the Ministerial Council on the Administration of Justice, for consideration and action.

Deaths since the Royal Commission

615. Thirty-four indigenous people and 193 non-indigenous people, a total of 227 people, are reported to have died in police and prison custody and juvenile detention in Australia since 31 May 1991, the date on which the Royal Commission's final national report was tabled, and 30 June 1994.

616. This represents an average of 10.8 Aboriginal deaths each year since the Royal Commission's report was tabled, compared with 10.5 per annum during the period covered by the Royal Commission. It is also notable that, since May 1989, the cut-off date for the deaths investigated by the Royal Commission, 59 Aboriginal and 304 non-Aboriginal custodial deaths have been reported as having occurred throughout Australia. With regard to Aboriginal people, this is an average of 11.6 deaths annually. Preliminary data for the period to the end of 1995 indicates an increase in the number of Aboriginal deaths in all forms of custody. Tables 28, 29, 30 show the number of deaths in custody by year, custodial authority and Aboriginality from 1980 to 1995.

617. In order to significantly reduce the number of deaths in custody, clearly the need for strong action by all governments to implement the recommendations of the Royal Commission into Aboriginal Deaths in Custody persists.

618. During 1995, the ATSIC Office of Evaluation and Audit evaluated government responses to the Royal Commission. Further commentary on the reporting and monitoring process was provided by the Aboriginal and Torres Strait Islander Social Justice Commissioner in his submission to the House of Representatives Standing Committee on Aboriginal and Torres Strait

Islander Affairs' inquiry into the Commonwealth's report on the implementation of the recommendations of the Royal Commission into Aboriginal Deaths in Custody, and his second annual report 1994. Collectively, these reports constituted a comprehensive evaluation of the implementation and monitoring of the Royal Commission recommendations.

619. In response to the reviews, the monitoring unit has identified strategies which take account of the concerns and issues raised. These strategies have received the endorsement of the Board of Commissioners and the Executive of ATSIC. To effect the strategies, the Board appointed a Portfolio Commissioner for the implementation of the Royal Commission into Aboriginal Deaths in Custody recommendations and the ATSIC Executive allocated an increase of $170,000 in salary dollars to the monitoring unit for the Royal Commission.

Young offenders

620. Child welfare legislation in each of the jurisdictions empowers police officers or other authorized persons, without warrant, to take certain children into custody. Further information is provided in paragraphs 640 to 675 of Australia's first report under the Convention on the Rights of the Child.

621. Further information on juvenile offenders is provided in paragraphs 1483 to 1691 of Australia's first report under the Convention on the Rights of the Child.

## Article 10

622. The establishment, maintenance and administration of prisons and remand centres in Australia are matters within the responsibility of state governments. By virtue of the Christmas Island Act 1958, the Cocos (Keeling) Islands Act 1995 and the Removal of Prisoners (Territories) Act 1923, people on Christmas Island and on the Cocos (Keeling) Islands who are convicted of crimes and are subsequently sentenced to a term of imprisonment are removed to Western Australia to serve their sentence.

623. The following discussion deals first with the Australian reservation to this article, then with specific state approaches to segregation, then with the treatment of detainees prior to conviction, the organization of prison life, the treatment of child offenders and finally rehabilitation schemes.

Reservation

624. While Australian jurisdictions accept the principles and objectives set out in article 10, Australia has maintained its reservation to this article in relation to paragraphs 2 and 3. This reservation provides:

> "In relation to paragraph 2 (a) the principle of segregation is accepted as an objective to be achieved progressively. In relation to

paragraphs 2 (b) and 3 (second sentence) the obligation to segregate is accepted only to the extent that such segregation is considered by the responsible authorities to be beneficial to the juveniles or adults concerned."

625. The reasons for this reservation are based on changing views about the best methods of punishing criminal offences. Generally, the view is held that it is not always desirable to separate juvenile from other offenders in all circumstances, for example, where segregation might in effect entail solitary confinement or living in conditions less amenable than those of the general prison population. Difficulties in meeting the segregation arrangements envisaged occur in the sparsely settled regions of Australia, where the cost of separately housing persons on remand and prisoners would not be justified in current circumstances.

626. For these reasons law or practice may not be fully consistent with the segregation provisions under the second paragraph of this article. However, since the submission of Australia's second periodic report further steps have been taken towards the segregation envisaged.

627. At the 1989 Conference of Correctional Administrators, the Standard Guidelines for Corrections in Australia were ratified. The new set of guidelines supplement the Standard Minimum Rules in their application to Australian prisons.

628. Under the guidelines, accused persons awaiting trial are separated from convicted persons as far as practicable. Remandees are accorded different treatment from convicted persons. They are permitted private communication with family, friends and legal advisers as far as possible and are not required to work or wear prison dress.

## Segregation

629. The Prisons (Correctional Services) Act 1980 (Cth) requires convicted prisoners not yet sentenced and prisoners on remand to be kept separate and apart from prisoners under sentence.

### New South Wales

630. The Prisons Act 1952 provides that "... to the fullest extent reasonable and practicable, convicted prisoners shall be separated from other prisoners, and different classes of convicted prisoners and different classes of other prisoners shall be separated ...". This operates generally to separate remandees and juveniles.

### Queensland

631. Queensland adopts a practice of separation, rather than segregation. Under most circumstances, remand prisoners are kept separate from convicted persons.

### South Australia

632. The South Australian Department of Correctional Services uses the United Nations Standard Guidelines as the theoretical framework for its operations. Consistent with those guidelines, remandees are held in separate accommodation from convicted offenders. The majority are held in the Adelaide Remand Centre which is a purpose-built facility that was commissioned in 1986.

### Tasmania

633. On average Tasmania has about 300 prisoners, with perhaps 30 being held on remand. While the Prison Regulations 1974 make provision for the segregation of remand prisoners and convicted persons, this is not always possible due to the small numbers involved. For instance, the total number of women in custody is typically about eight persons. Separation of women on remand from sentenced prisoners could be tantamount to solitary confinement. Where facilities permit, prisoners charged with serious offences are segregated from prisoners charged with less serious offences.

634. A new remand centre for Hobart should be completed in 1997 which will provide better conditions for separation of remandees and sentenced persons. It will also provide for separation of persons on remand who have different needs.

### Victoria

635. In Victoria, separation of convicted and unconvicted prisoners has improved since the last report, but is still not complete. While the majority of male remand prisoners are detained in the Melbourne Remand Centre, which accommodates 240 prisoners, the Metropolitan Reception Prison remains a reception prison (i.e. receiving both sentenced and unsentenced prisoners from the court). Female remand prisoners are accommodated at Fairlea prison. While Fairlea and the Metropolitan Reception Prison house remand prisoners, it is impractical to keep the two groups segregated, although clearly some separation is possible.

### Western Australia

636. In Western Australia, the Prison Regulations 1982 require that as far as is practicable, prisoners on remand must be separated from sentenced prisoners. Remandees may be held at regional prisons for short periods of time due to the distance from Perth. Adult remandees may also be held at metropolitan prisons when the Remand Centre is full. Wherever possible separation is maintained, however this is not always practical in view of the need to ensure remandees have access to work, recreation, medical and other services. Different management regimes apply to remandees, including visits by legal representatives to facilitate their defence case.

Treatment prior to conviction

637. As already discussed in comments on articles 7 and 9, persons cannot be deprived of their liberty in Australia except in accordance with the law. A mixture of federal and state statutes, the common law and police regulations determine the treatment of people once detained.

638. An act which breaches these standards, such as assault, may constitute a criminal offence and the ordinary criminal and civil actions would be available. As mentioned in the core document, mechanisms also exist whereby complaints against the police may be investigated by an independent authority (the Ombudsman or a specialist independent tribunal) which can recommend appropriate action. Internal police disciplinary action may also be taken. There is no such legislation in regard to Norfolk Island. Mistreatment of a person in custody for the purpose of gathering evidence (for example, obtaining a confession) will render evidence so obtained liable to be excluded by the court as unlawfully or improperly obtained. Mistreatment of a person in custody will also raise the issue of whether a confession is admissible.

639. Aspects of remand regimes of some states are discussed below.

Northern Territory

640. Every person detained or arrested is inspected. At the time of arrest it is noted whether or not the prisoner appears to be free of injury or distressed or in need of professional medical treatment. Action must be taken to try to reduce the anxiety and disorientation that prisoners may have. A female prisoner will be searched only by a female person. Male prisoners are kept apart from female prisoners.

641. The officer in charge of a police station is to establish and maintain a cell visitors scheme. The underlying principle of the scheme is to prevent prisoners experiencing a sense of despair, isolation or desertion leading to the deterioration of physical or mental health.

South Australia

642. In South Australia, officers in charge of police stations are responsible for the security and care of prisoners in custody at their station.

643. The Police General Duties Manual provides in general order 5750:7.3 that officers in charge of stations will be held responsible for the security and care of the prisoners in custody at their stations. They are to ensure that sufficient supervision and attendance are arranged to prevent prisoners from harming themselves or others or committing damage to property. Prisoners who are likely to be attacked by other prisoners are to be isolated at all times when in police custody.

### Tasmania

644. In Tasmania, prisoners in police custody have the same rights to personal safety as ordinary citizens, subject to the qualification that police officers may use reasonable force in preventing their escape and in searching and processing them. Emphasis is placed on the prevention of injury to prisoners in both police regulations and internal instructions. Prisoners must be visited regularly and regard had to a number of factors such as the state of mind of the prisoner, suicidal tendencies, etc. Such matters must be noted in the watchhouse register and matters of particular concern must be communicated to supervising officers.

645. The supervision of persons in police custody is being progressively transferred to the Corrective Services Division of the Department of Justice. With the completion of the new remand centre in Hobart in 1997, persons taken into custody by police will be transferred to Corrective Services immediately after being charged, if not released on bail. This role has already been taken over by Corrective Services in Northern Tasmania.

### Prison organization

646. As stated in the introductory comments on this article, the establishment, maintenance and administration of prisons and remand centres in Australia is the responsibility of state governments. Thus, people sentenced for offences against federal laws are housed in state prisons in accordance with section 120 of the Australian Constitution, which provides:

> "Every State shall make provision for the detention in its prisons of persons accused or convicted of offences against the laws of the Commonwealth, and for the punishment of persons convicted of such offences, and the Parliament of the Commonwealth may make laws to give effect to this provision."

647. The state prison systems also house offenders convicted of offences in Australian territories where the size of the population is not sufficiently large to justify a separate prison system. For example, all Norfolk Island prisoners are detained in New South Wales prisons and Australian Capital Territory prisoners may serve their sentences in New South Wales.

648. In all Australian state jurisdictions, prisons legislation provides for the establishment, maintenance and administration of institutions where persons are detained. The relevant legislation is as follows:

| | |
|---|---|
| New South Wales: | Prisons Act 1952 |
| Northern Territory: | Prisons (Correctional Services) Act 1980 |
| Queensland: | Corrective Services Act 1988 |
| South Australia: | Correctional Services Act 1982 |
| Tasmania: | Prison Act 1977 |

| | |
|---|---|
| Victoria: | Corrections Act 1986 |
| Western Australia: | Prisons Act 1981 |

649. The legislation provides generally for the well-being and protection of detainees. For example, it makes provision for the adequate nourishment and exercise of prisoners, their medical treatment, the retention of prisoners' private property while in prison and the return of the property upon release, religious worship and their recreational and vocational activities. Medical officers are available to make periodic inspections of the prison and to report to the officer in charge of the prison on matters of health and hygiene.

650. All Australian prison systems provide a full range of medical, dental, pharmaceutical and psychiatric services. Basic medical and dental care is provided free of charge. Larger prisons have full-time medical staff and hospitals within those prisons. In more remote areas medical services are provided by local doctors on a contract basis. Prisoners may also be transferred to public hospitals. In Victoria a special security ward has been established in a public hospital for this purpose. In New South Wales, in addition to Long Bay Hospital which is located within the Long Bay Correctional Complex, there is a locked ward of a public hospital, Prince Henry Hospital.

651. Provision is made for relatives and friends to visit prisoners and for prisoners to communicate with other persons. While certain prisoners' correspondence may be opened, there are statutory exceptions to this. For example, the Federal Human Rights and Equal Opportunity Commission Act 1986 provides that correspondence between people held in custody and the Commission is not to be opened by prison officials. At a state level, an example is provided by the Northern Territory Prisons (Correctional Services) Act 1980, which forbids the officer in charge of the prison from opening letters addressed to the office of the responsible minister, the Ombudsman, the director or the prisoner's legal representative. Official Visitors (or their equivalent), appointed under legislation, carry out inspections of prisons at frequent intervals, make reports to the minister at their own discretion or as required and inquire into complaints by prisoners. In Victoria, the Corrections Act 1986 grants prisoners the right to send unopened letters to and receive unopened letters from the Ombudsman. Prisoners are granted a qualified right to receive other letters uncensored by prison staff.

652. Mistreatment of a person in custody would constitute a criminal offence in most cases and a civil action in damages might also lie. Prisoners may complain of maltreatment to the Ombudsman, Official Visitor (or equivalent), the officer in charge of the prison or the responsible minister, each of whom has discretion to institute an investigation of the complaint.

653. In general, prison offences are specified in legislation and accompanying regulations. However, the daily operation of a prison is the responsibility of the superintendent or governor who may formulate rules to facilitate this. Such rules must be consistent with the delegating legislation. Alleged breaches of the rules are generally dealt with, in the

presence of the prisoner, by either the manager of the prison or a magistrate (called a Visiting Justice or Tribunal in some jurisdictions). Appeal rights exist in all cases. For example, under the South Australian Correctional Services Act 1982 a prisoner may appeal to a Visiting Tribunal from a decision of a prison manager. An appeal also lies to the District Court from a decision of the Visiting Tribunal on a matter of law. In some jurisdictions, courts have held that a de novo appeal lies to the District Court from a decision by a Visiting Justice. For example in New South Wales, R v. Fraser [1977] 2 NSWLR 867 upheld this principle so that the hearing of disciplinary charges before a Visiting Justice should approximate as closely as possible the procedure in an outside local court.

654. A wide range of punishments is available for prisoners offending against prison rules. These are designed to maintain order and discipline and to protect other prisoners and those employed in prisons. The punishments include the withdrawal of privileges, and measures such as solitary confinement or restricted diet. Some jurisdictions however prohibit the imposition of solitary confinement. For example, the New South Wales Act provides that a prisoner may not be put into a dark cell or mechanical restraint, or suffer solitary or corporal punishment, or be subjected to torture, cruel, inhuman or degrading punishment.

## Rehabilitation

655. One of the primary aims of the penitentiary system in Australia is rehabilitation. As mentioned above, education and training facilities are also provided in prisons. As referred to in the comments on articles 7 and 8, legislative provision is made in all Australian jurisdictions for probation and parole, in a number of states for community service orders and, in some jurisdictions, for work release programmes.

656. The Australian Institute of Criminology collects and disseminates information about all Australian custodial and non-custodial correctional systems. Each year since 1982 it has conducted an annual census of all persons in gazetted prisons, and approximately every second year since 1985 it has conducted a census of all persons serving non-custodial correctional orders. The results of these censuses are widely used for research and planning purposes.

657. In a number of jurisdictions, programmes on and after release from detention have also been designed with rehabilitation into the community as their primary aim. Queensland conducts an extensive community service order programme as well as a release to work programme. In Western Australia certain prisoners may participate in a community based work release programme prior to commencing parole or prior to completing their sentence. The programme aims to assist prisoners who have served sentences of more than 12 months to return to the community.

658. Legislation requiring a criminal history to be disregarded also assists in the rehabilitation process. Federal legislation regarding spent convictions came into effect on 30 June 1990. The scheme is contained in Part VII C of the Crimes Act 1914 and applies where the offender was sentenced to imprisonment for not more than 30 months. It prohibits any

discrimination by federal bodies on the basis of those offences (whether they are federal or state offences) where the offender has had 10 conviction-free years from the date of conviction. In the case of those who are convicted as a juvenile, the person needs only five conviction-free years. The scheme gives a right of non-disclosure to the offender if his/her conviction is spent (section 85ZW). These provisions are broader than those which are based in the Human Rights and Equal Opportunity Commission Act 1986 and they confer a greater range of powers on the Privacy Commissioner, who may investigate the alleged breaches, in handling and resolving complaints. The Human Rights and Equal Opportunity Act 1986 puts into effect Australia's commitment to International Labour Organization Convention 111, the Discrimination (Employment and Occupation) Convention 1958. The Act specifies the same forms of discrimination as the International Labour Organization Convention and allows for further forms of discrimination to be determined by regulation. Regulations which declared an additional 12 grounds of discrimination for the purpose of the Act in relation to employment and occupation came into effect on 1 January 1990. They included discrimination on the grounds of criminal record. Accordingly, the Human Rights Commission has jurisdiction to inquire into and attempt to resolve complaints of discrimination lodged by persons who allege that they have been discriminated against in employment or occupation because of their criminal record.

659. The legislation provides exemption from the scheme for certain persons or bodies for specified purposes. For example, a person who employs other persons in the care of minors is exempted for the purpose of finding out whether a prospective employee has been convicted of a sexual offence. There is provision for further exemptions to be prescribed by regulation. The scheme also applies to discrimination by private or state bodies in the same circumstances where the offence is against a federal and state or non-self-governing Territory law.

660. There is legislation in Queensland, Western Australia, New South Wales and the Northern Territory creating spent convictions schemes in those jurisdictions. In New South Wales, the Criminal Records Act 1[illegible] provides for the convictions of a person to be spent if the person completes a period of crime-free behaviour (being 10 years for adults and 3 years for children). The scheme does not apply to certain convictions, including those for which a prison sentence of more than six months has been imposed, and convictions for sexual offences. The Queensland Criminal Law (Rehabilitation of Offenders) Act 1986 and the Western Australian Spent Convictions Act 1988, provide, _inter alia_, that any person or authority assessing a person's fitness to be admitted to a professional occupation, etc. must disregard any conviction forming part of such person's criminal history in respect of which a rehabilitation period has expired and not been revived. There are certain occupations which are exempted from the duty to disregard convictions, for example, police, teachers. The Queensland Criminal Law (Rehabilitation of

Offenders) Act was amended in 1990 to provide for different rehabilitation periods depending on the type of offence for which the person was convicted. The periods are as follows:

> Five years in the case of a person convicted of either a simple offence or an indictable offence which has been dealt with summarily in the magistrates court; and
>
> Ten years where the matter has been dealt with on an indictment in the superior courts.

Juvenile offenders

661. Detailed information on the collection of identifying material from children is provided in paragraphs 430 to 438 of Australia's first report under the Convention on the Rights of the Child. Further information on juvenile offenders is provided in paragraphs 1483 to 1691 of Australia's first report under the Convention on the Rights of the Child.

## Article 11

662. All Australian jurisdictions comply with the requirements of this article. The common law makes a clear distinction between those laws involving public order, the State and its citizens (i.e. criminal laws) and those laws concerning private relationships between citizens, e.g. the law of contract. Failure to fulfil a contractual obligation results only in the possibility of obtaining an order of a court for specific performance of the contract or for damages. In the event of the failure of a person to comply with an order of the court, the court will exercise its discretion as to the sanction to be applied to the defaulting person.

## Article 12

663. The Federal Government considers that Australian law and practice are in conformity with this article. Although there is no absolute right to liberty of movement within, from or into Australia, such limitations as do exist are few and are considered consistent with paragraphs 3 and 4 of this article. Those limitations are outlined below.

Freedom of movement within Australia

664. Australia does not have any laws to regulate the movement generally of citizens or non-citizens within its territory. However there are specific controls on entry to some areas of the country. Control is exercised over entry to four types of land:

> Some Australian external territories;
>
> Aboriginal and Torres Strait Islander lands;
>
> Land set aside for defence purposes; and
>
> Certain national parks.

665. These are dealt with in turn in the following sections. In general, Australian land may be owned absolutely by the Crown, subject to native title, or privately owned (that is, held under titles granted by the Crown, for freehold and leasehold, including to Aboriginal and Torres Strait Islander people under land use legislation). Land vested in the Crown is normally dedicated to a specific purpose and the Crown reserves the right to control access to such land in accordance with the purpose for which the land is dedicated. The extent of the right of native-title holders to regulate entry onto land will depend on their traditional laws and customs but may include the right to exclusive possession or the right to exclude specific groups of people. Private owners of land also have a general right to regulate entry onto their land and, if necessary, can prevent unauthorized entry by means of an action in trespass. In turn, private owners may be subject to certain rights reserved to the Crown (for example, to the minerals of the land) and legislation allowing entry to the land by government authorities in the public interest (for example, in relation to public health).

666. In regard to freedom of movement between the States, the Constitution of Australia provides by section 92 that:

> "trade, commerce and intercourse among the States, whether by means of internal carriage or ocean navigation, shall be absolutely free."

667. This guarantee has been judicially interpreted to include the free movement of persons as well as goods. The word "intercourse" has been interpreted to include all migration or movement of persons from one state to another, including ordinary members of the public as well as business people. This freedom was upheld even during wartime. It does not, however, apply to trade, commerce or intercourse with the territories (including the Northern Territory). A separate, but similar, guarantee of freedom of movement between the states and the Northern Territory is provided for in section 49 of the Northern Territory (Self Government) Act 1978.

### External Territories

668. The Migration Act 1958 extends to Christmas Island and the Cocos (Keeling) Islands. It provides the same freedom of movement to, from and within Christmas Island and the Cocos (Keeling) Islands as for other areas of Australia.

669. Entry to and residence in Norfolk Island is controlled by the Immigration Act 1980 of Norfolk Island. Under the Act, which is administered by the Norfolk Island government, there are four categories of entry permit. Under a visitor's permit a stay in Norfolk Island of a maximum of 120 days is possible. Temporary entry permits may be granted for a period of up to one year and such permits may be granted subject to conditions as to employment. General entry permits may be granted for periods of up to five years and six months and such permits may also be granted subject to conditions. Declarations of residency entitle a person to reside permanently in Norfolk Island and such residency is not subject to any restrictions.

670. The Cocos (Keeling) Islands, Christmas Island and Norfolk Island are discussed further under article 1, above.

## Aboriginal and Torres Strait Islander land

671. Under Australian law, there is no restriction on freedom of movement which is specific to either Aboriginal or Torres Strait Islander Australians.

672. Where freehold title has been acquired by Aboriginal or Torres Strait Islander interests, visitor entry rights are subject to the same laws of trespass which apply to the community at large. However, certain statutory schemes have granted freehold title to significant areas of land, particularly in South Australia, Queensland and the Northern Territory, to the traditional owners of the land or to Aboriginal land councils which hold that title in trust for the Aboriginal traditional owners. In the case of land covered by these schemes, persons other than the traditional owners and certain exemptions (for example, the police, medical practitioners, members of (or candidates for) Parliament, certain public officials and Aboriginal and Torres Strait Islanders with traditional interests which do not amount to ownership), are required to seek formal permission to enter onto those lands from the traditional owners or the relevant land council administering the lands.

673. Similar restrictions apply under schemes where land has been leased to, or reserved for the exclusive benefit of, particular Aboriginal and Torres Strait Islander communities or organizations. Freedom of entry is confined to members of the particular community or exempt group, with all others being required to seek permission from the community or the relevant state government authority.

674. In South Australia, the Pitjantjatjara Land Rights Act 1981 and the Maralinga Tjarutja Land Rights Act 1984 vest freehold title in the traditional owners as described above. Under these Acts, a person other than a traditional land owner who enters the land without the permission of the body in which the land is vested commits an offence. A High Court decision in 1985 has confirmed that these restrictions together with the permit entry system constitute a "special measure" for the Aboriginal people and as such fall within a legitimate exemption from the Federal Racial Discrimination Act 1975, which is based on the International Convention on the Elimination of All Forms of Racial Discrimination. The entry restrictions contained in these Acts are therefore not subject to the race discrimination prohibitions contained in that Act.

## Defence restrictions

675. Controls over entry onto specified land and sea areas and into air space set aside for defence purposes, as well as controls over access to defence establishments, facilities and other properties exist in Australia. These restrictions are imposed by law in the interests of preserving national security.

## National parks

676. Protected areas of Australia, such as national parks, are generally open to the public but access may be limited or even prohibited in certain areas in order to serve the purpose for which the reserve was created, for example, to preserve areas of specific historical or ecological significance.

677. In Queensland, the Recreation Areas Management Act 1988 provides for areas to be declared as recreation areas and controls public access to these areas by means including the levying of fees and charges, the restriction of access to certain areas, and permits for camping and control over environmentally harmful activities of people and vehicles in the areas. Areas which have been declared as recreation areas include Fraser Island, Moreton Island and Green Island. Other states have similar legislation. Such control mechanisms are well recognized mechanisms to control access to areas of ecological significance.

678. Tasmanian legislation makes provision for prohibition of entry to certain areas of land which are the subject of forestry operations. This is not a general prohibition, and can only be applied in relation to specific areas by special order of the Minister responsible.

## Emergency restrictions

679. Movement within and out of Australia may also be restricted under the legislation of some states. Under the Queensland State Counter-Disaster Organization Act 1975, the authorities may direct the exclusion of people from any place or the closure of any road to traffic or the closure of any public place when a state of disaster has been declared. Under the New South Wales State Emergency and Rescue Management Act 1989, the authorities may require people to move out of, or not to enter, an emergency or danger area. Under the Victorian Emergency Management Act 1986, when a state of disaster has been declared or an area has been declared to be an emergency area, the authorities may restrict movement. Under the Tasmanian Emergency Services Act 1976, when a state of emergency has been declared, the authorities may exclude people from any place. The Northern Territory Disasters Act 1982 empowers the authorities in the event of a state of disaster to exclude any person from any place. Under the South Australian State Disaster Act 1980, the authorities may direct or prohibit the movement of people into or within a disaster or emergency area (see also under article 4, Types of emergencies, above).

## Movement out of Australia

680. The right of persons to move out of Australia is governed, in the case of citizens, by way of controls over the issue of passports. All persons, including Australian citizens, are required to present evidence of identity, through the presentation of national travel documents, and information in the form of completed passenger cards.

681. In relation to refugees, Australia is a party to the 1951 Convention as amended by the 1967 Protocol Relating to the Status of Refugees, which contains certain obligations as to the travel of refugees. People who seek

Australia's protection have their claims to be a refugee assessed as defined by the Refugees Convention. On 1 September 1994, the Protection Visa was established by amendments to the Migration Act 1958 and is the mechanism by which Australia offers protection to persons who fall under the Refugees Convention. An applicant who is successful with the refugee application is granted a Protection Visa allowing him or her to stay permanently in Australia.

682. Australia's treatment of refugees is discussed further under Unlawful non-citizens, article 9, above, and under Unlawful non-citizens, article 13, below.

683. In Australia, any person who is able to establish Australian citizenship and identity is entitled to an Australian passport, except in the following limited circumstances, under the Passports Act 1938:

> Where the applicant is a person under 18 years who is not and never has been married unless:
>
> > The consent of all persons having custody or guardianship of or access to the minor is obtained; or
> >
> > A court has permitted the minor to leave Australia; or
> >
> > Other special circumstances exist;
>
> Where there is reason to believe that there is in force a warrant issued in Australia for the arrest of the applicant;
>
> Where the applicant is required, by order of a court made in pursuance of an Australian law, or under a condition of parole or of a recognizance, surety or bail bond to remain in Australia or to refrain from obtaining an Australian passport;
>
> Where there is reason to believe the person who is an applicant for a passport owes money to the Federal Government in respect of:
>
> > Expenses incurred by the Federal Government on behalf of the applicant in a foreign country;
> >
> > Moneys lent to the applicant by the Federal Government at a time when the person was outside Australia; and
> >
> > Expenses incurred by the Federal Government in, or in connection with, effecting the return of the applicant to Australia from a foreign country;
>
> Where the Minister has formed an opinion that, if an Australian passport were issued to a person, that person would be likely to engage in conduct that:
>
> > Might prejudice the security of Australia or of a foreign country;

> Might endanger the health or physical safety of other persons, whether in Australia or in a foreign country; or
>
> Might interfere with the rights and freedoms of other persons, as set out in the International Covenant on Civil and Political Rights, whether in Australia or in a foreign country.

684. All of these circumstances are subject to the overriding discretion of the Minister for Foreign Affairs and Trade to direct that a passport be issued notwithstanding that conditions sufficient to deny issue exist. The Minister may also cancel a passport. No records of refusals of passports are maintained but refusals of adult passports are extremely rare. Decisions relating to the issue, refusal or cancellation of passports are subject to review by the Administrative Appeals Tribunal. However, passport applications of children who are subject to court orders preventing their removal from Australia are automatically refused in compliance with section 70A (1) of the Family Law Act 1975.

685. The Migration Act 1958 contains no power to prevent a person from leaving Australia. The Act, however, institutionalizes the practice of requiring passengers departing Australia to provide evidence of identity and information, usually in the form of a completed passenger card and a passport.

686. Moreover, it is administrative practice for migration inspectors to see and interview a number of departing passengers. Likely interviewees include:

> A non-citizen resident departing temporarily without a visa;
>
> A person admitted temporarily to Australia who has remained beyond the authorized period of stay;
>
> An Australian citizen whose travel document has expired; and
>
> A seafarer who has been signed off his vessel in Australia without approval.

687. The migration programme is designed to select people best able to contribute to Australia at the time of their selection for migration, either through their connection with Australian citizens or permanent residents or through their potential economic contribution.

688. In order to protect the Australian community, all applicants for permanent residency must satisfy public interest criteria, which include a health test. The health test provides that a person should be free from communicable disease of a fatal or serious nature which are a threat to public health in Australia, and any other disease which may be a danger to other members of the community. Also, a person should be free of any disease or condition which would require significant care or treatment. However, the Minister of Immigration and Ethnic Affairs retains a discretion to waive the health requirements in specific circumstances.

689. Under the Migration Act 1958, non-citizen permanent residents require a visa to re-enter Australia. Such a visa may be obtained prior to leaving Australia or at an Australian mission overseas. Current migration regulations link eligibility for a resident return visa to the period of time spent in Australia in the three years preceding such an application. The requirement for permanent residents to meet residential requirements for return visas is consistent with the structure of the migration programme.

690. The resident return provisions also provide generous visa periods for family unit members (including spouses) of Australian citizens. Thus a person accompanying an Australian citizen spouse overseas may be granted a five-year return visa provided he or she has been an Australian permanent resident at some time during the last five years. Concessions are available for those who cannot meet the residential requirements, where it is in Australia's interests for them to retain the right of permanent residence. Furthermore, people who lose their permanent resident status may, of course, reapply to migrate to Australia.

691. International travellers who are 12 years of age or over are required by law to pay a departure tax before leaving Australia. Departure tax is levied as a revenue raising item. It is not levied with the intention of preventing or deterring departures from Australia. The amount of the tax ($25 in late 1995) is small when compared to other costs associated with international travel.

692. The Departure Fee Act 1980 of Norfolk Island imposes a fee of $25 on persons leaving the Island. There are a number of exceptions to the fee relating to, for example, persons leaving Norfolk Island after a visit of less than 24 hours, persons in transit and persons leaving the island for medical or educational purposes.

693. The Torres Strait Treaty, ratified in 1985, between Australia and Papua New Guinea, establishes among other regimes a protected zone to protect the way of life and livelihood of the traditional inhabitants of the Torres Strait area. The treaty allows traditional inhabitants from both sides of the border to move freely and pursue traditional activities without normal, immigration control, within the protected zone. This is done through a number of committees and consultative mechanisms involved in the implementation and management of the treaty.

## Article 13

694. Only the Federal Government may order the expulsion from Australia of a non-citizen lawfully or illegally in Australia. No Australian government has the power to deport citizens. The Federal Government believes that existing arrangements comply with the requirements of this article.

695. This section discusses the criteria for and rights of review available to:

> Lawful non-citizens who have had a deportation order signed against them; and
>
> Unlawful non-citizens who are to be removed from Australia.

Lawful non-citizens

696. Deportation is governed by provisions of the Federal Migration Act 1958. Permanently resident non-citizens may be deported from Australia either because they have committed a crime or on national security grounds.

697. To fall within the criminal deportation provisions, the person must have been convicted of an offence and been sentenced to death or imprisonment for more than one year. Where the offence is one such as treason, treachery, sabotage, mutiny, assisting prisoners of war to escape, attempting or conspiring in relation to sedition, this is sufficient grounds for deportation.

698. In the case of other offences, however, the offender can only be deported if he or she was permanently resident in Australia, or was a New Zealand holder of a permanent or special category visa who had lived in Australia, for less than 10 years in total at the time of commission of the offence. Only if these conditions are satisfied may the Minister order the deportation of the person.

699. In making a decision on deportation in criminal cases, the Minister takes into full consideration a variety of factors, including the human rights of the individual concerned, the obligations of Australia under international treaties and any hardship the individual would suffer, including evidence of likely persecution in the country to which the person would be deported.

700. To be deported on the grounds of national security, the person must:

> Appear to the Attorney-General to be a threat to the security of Australia, a state or territory; and
>
> Be the subject of an adverse security assessment by the Australian Security Intelligence Organisation.

701. Australia's policy is that a non-citizen whose deportation is being considered must be given adequate opportunity to make whatever representation he or she considers necessary, prior to a deportation decision being made.

702. Every person against whom a deportation order has been signed is as a matter of practice informed of his or her right to seek review. The person is also informed that he or she should contact a legal aid office to determine whether he or she is eligible for legal aid.

703. The process of review, however, differs depending on the grounds for the deportation orders. Where a deportation order has been signed on the grounds of criminal offences such as treason, treachery, sabotage, mutiny or assisting prisoners of war to escape, attempting or conspiring in relation to sedition, the permanent resident may seek a review of the decision by a Commissioner appointed by the Governor-General. The Commissioner must be a judge or other experienced lawyer. Where a deportation order has been signed on criminal grounds other than the above, the permanent resident may appeal to the Administrative Appeals Tribunal.

704. Permanent residents who are potentially liable for deportation on the basis of national security can seek review of the assessment that they are a security threat by the Security Appeals Tribunal.

705. In addition, permanent residents are entitled to challenge the validity of the deportation order in either the Federal Court or the High Court of Australia.

Unlawful non-citizens

706. The Migration Act 1958 requires that, where an officer knows or reasonably suspects that a person is an unlawful non-citizen, the officer must detain that person. Unlawful non-citizens must be detained until they are removed or deported from Australia or are granted a visa.

707. An unlawful non-citizen in immigration detention who has exhausted all avenues of application and review must be removed from Australia. Persons so removed are barred from return to Australia for a period of up to five years. There is, however, provision to waive the bar on return in compassionate and compelling circumstances.

Refugees

708. The detention of unlawful non-citizens (that is, non-citizens on Australian land or in an Australian port without a current visa) was discussed further in the commentary under article 9, above. As stated above, the Migration Act 1958 provides a uniform regime for the detention and removal of persons unlawfully in Australia. This section deals specifically with people who enter Australia illegally and who claim refugee status.

709. Australia provides asylum to people who are refugees under the Convention relating to the Status of Refugees of 1951. The obligation not to expel or return a refugee is fulfilled in Australia under the provisions of the Migration Act 1958. The Act provides for the grant of protection visas to people who are refugees within the meaning of the Convention as amended by its 1967 Protocol. Australia also considers its obligations under the Convention against Torture not to expel or return a person who may be subjected to torture when deciding whether to deport a non-citizen who has committed a serious crime.

710. The Migration Act 1958 provides for the grant of protection visas to non-citizens in Australia to whom Australia has protection obligations under the Refugees Convention as amended by the Protocol thereto. This visa

confers permanent residence status. All members of a family unit of a person granted a protection visa are also granted the same legal status, if they are also in Australia.

711. Applications for refugee protection are assessed by officers of the Department of Immigration and Ethnic Affairs, appointed as delegates of the Minister. These decision-makers consider relevant information about the applicant's country of origin, as well as the claims and information provided by each applicant. An extensive collection of country information focusing on human rights issues is held and maintained by the Department of Immigration and Ethnic Affairs for use in the refugee decision-making process. Decisions are only made after the applicant has had the opportunity at interview to consider any adverse assessment and provide comments or material in relation to that assessment.

712. Under the Migration Act 1958, an unsuccessful applicant for a protection visa has the right to have that decision reviewed by the Refugee Review Tribunal. The Refugee Review Tribunal is an independent statutory body which provides determinative merits review of refugee status decisions. The Tribunal sits as single member panels and uses a non-adversarial approach to the testing of claims. The Tribunal may exercise all the powers and discretions of the decision-maker and may affirm, vary, set aside and substitute a decision, or, in certain cases, remit the matter for reconsideration.

713. The Minister responsible for immigration matters may issue a conclusive certificate which has the effect of precluding that decision from review. The conclusive certificate must state the reasons of public interest why the decision is not to be reviewed and be tabled in Parliament, thereby providing an opportunity for parliamentary scrutiny of the decision.

714. The Tribunal is required to provide review that is fair, just, economical, informal and quick. It is not bound by technicalities, legal forms or rules of evidence and must act according to substantial justice and the merits of the case. Decisions of the tribunal are published, but the identity of the applicant or applicants remains confidential.

715. The principal member of the Tribunal may refer a decision directly to the Administrative Appeals Tribunal where he or she considers that the matter involves an important principle or issue of general application. The Administrative Appeals Tribunal may then exercise the same review powers as the Tribunal.

716. The Minister also has the discretion to substitute a more favourable decision in place of a decision by the Tribunal or the Administrative Appeals Tribunal, if he or she considers that it is in the public interest. Review of an adverse decision by the Refugee Review Tribunal or the Administrative Appeals Tribunal lies with the Federal Court on a question of law. Judicial review by the High Court is available at any stage. Protection visa applicants may only seek judicial review of their cases after the Tribunal review stage.

717. The Migration Act 1958 specifies the grounds on which judicially reviewable decisions may be reviewed. These are discussed under article 9 above.

### Torres Strait Treaty

718. Reference was made in the commentary under article 12 to the Torres Strait Treaty. It is relevant to note in connection with article 13 that Papua New Guineans who, as traditional inhabitants of the Torres Strait area, have access without the normal immigration controls to Australian territory would, if they moved beyond the area "in or in the vicinity of the Protected Zone" or ceased to perform traditional activities, but remained in an area of Australian jurisdiction, become subject to normal visa requirements under the Migration Act 1958.

## Article 14

719. For general information on Australia's court structure see Australia's core document.

### Judiciary

#### Independence

720. In Australia each of the federal and state systems of governance incorporates the three arms of government: legislative, executive and judicial.

721. At a federal level, the Australian Constitution provides for a strict separation of powers between judicial and other arms of government.

722. Under section 71 of the Australian Constitution, federal judicial power can only be exercised by a court - the High Court, a court created by the Federal Parliament, or a court of a state which is invested with federal judicial power. The term "federal judicial power" refers to judicial power relating to one or more of the classes of dispute set out in sections 75 and 76 of the Constitution (these sections set out the original jurisdiction of the High Court).

723. This does not mean that judges cannot be appointed to non-judicial bodies (see 1995 High Court decision in Grollo v. Commissioner of the Australian Federal Police 31 ALR 225; 69 ALJR 724). Judges are appointed to non-judicial bodies such as tribunals, law reform commissions, royal commissions and special inquiries. While performing such duties, judges often do not sit on the courts to which they were appointed, but their judicial salaries are continued and no additional salary is paid.

724. Nor does it mean that non-judicial officers may not exercise judicial powers. A delegation of judicial powers to non-judicial officers in the court organization is valid if the delegation is controlled by the judges and the exercise of the power is subject to real supervision.

725. Section 72 of the Constitution reinforces the independence of the federal judicature by providing that a judge of the High Court or any other court created by the Federal Parliament shall not be removed unless both Houses of the Federal Parliament request the judge to be removed on the ground of "proved misbehaviour or incapacity".

726. By contrast, most of the state constitutions do not entrench the independence of state courts. Specifically, although state constitutions contain provisions in relation to the judicial tenure of senior state judges similar to section 72 of the Australian Constitution, these provisions can in most cases be amended or repealed by an act of the state parliament. (The Australian Constitution can only be amended if a majority of voters in a majority of states and an overall majority of electors Australia-wide approve the amendment.) Further, the conventional view is that the judicial power of a state can be exercised by an administrative body as well as by a court.

727. Whatever the strict constitutional position may be, state parliaments and governments have traditionally observed certain conventions which operate to safeguard the independence of the state judiciary. Indeed, these conventions have ensured that the independence enjoyed by courts at the state level is comparable to that enjoyed by courts at the federal level.

728. Where misbehaviour is alleged, Australian convention at both federal and State level is for a commission to be established to hear complaints against the judge or judges and to recommend action to the relevant parliament.

### Appointment

729. Judges hold public office until retiring age. All state judges now serving are subject to a retirement age of 70 years. Federal judges are now appointed to serve until the age of 70 (or earlier with the approval of the Federal Parliament). In some state courts, judges over the retirement age may be asked to assist in meeting excess workload.

730. Reform of the judicial selection process is a matter of ongoing debate in Australia. In particular, the need for greater ethnic diversity and more women in the selection process has been recognized. In September 1993, the then Federal Attorney-General published a discussion paper entitled "Judicial appointments - procedure and criteria". The paper highlighted, among other issues, the limited nature of the consultation for the appointment of judges and the narrow field of possible candidates for judicial appointment, largely in the private Bar. The issue of judicial appointments was also noted in the then Federal Government's Justice Statement and in the Government's response to the Gender Bias and the Judiciary report, which was released in May 1994 by the Senate Standing Committee on Legal and Constitutional Affairs.

731. Steps have been taken by some jurisdictions towards appointing judicial officers with a range of backgrounds. In 1994, the Queensland Attorney-General appointed 10 specially trained justices of the peace with the power of magistrates from local indigenous communities.

732. Lay assessors may be used in some jurisdictions in certain circumstances. For example, in South Australia, the Supreme Court Rules provide for the court to call in a specially qualified assessor to assist the court. In New South Wales, suitably qualified conciliation and technical assessors may be appointed to the Land and Environment Court. The Chief Justice of that court may direct that certain matters be heard by an assessor, in which case the decision of the assessor is the decision of the court, or an assessor may be used to assist the court when hearing proceedings.

733. There are no guidelines for the advancement of judges. In all jurisdictions, advancement occurs by way of appointment. All judges on a court receive the same remuneration (except in some instances the Chief Justice). Salary is reviewed periodically by remuneration tribunals.

### Impartiality

734. Under the Australian common law, a judge should disqualify him- or herself if the judge feels unable to hear a case impartially and fairly, or if the judge considers that he or she might not resolve the issue with a fair and unprejudiced mind. If a judge has any pecuniary interest or personal relationship with the parties, the judge should not hear the case.

735. A person who has had an adverse decision made in his or her case and who reasonably believes that the person who acted in a judicial capacity in that case is, for whatever reason, not impartial may lodge an appeal. On appeal, the adverse conviction may be quashed or any order made may be set aside.

736. In 1993, the Senate Standing Committee on Legal and Constitutional Affairs established the Inquiry on Gender Bias and the Judiciary. This was in response to the question whether publicity surrounding judicial comment in sexual offence cases was a proper reflection of a failure by the judiciary to understand gender issues, and to provide the appropriate response to any such failure. The Federal Government's responses are discussed under Education, below.

### Education

737. Education programmes for the judiciary aim to address possible partiality arising from a judge's gender or cultural and educational background by raising awareness of gender and cross-cultural issues.

738. In response to recommendations of the Access to Justice Advisory Committee, the Royal Commission into Aboriginal Deaths in Custody (see further commentary under articles 9 and 27) and others, funding was made available for education programmes for the judiciary through the Family Court and the Australian Institute of Judicial Administration. Other programmes have also been provided, for example in Western Australia, and in New South Wales by the Judicial Commission of New South Wales. A particular focus has been on gender awareness and cross-cultural issues.

739. In relation to gender awareness, the Australian Law Reform Commission report Equality Before the Law recommended that judges, magistrates and court officers who deal with family law and violence matters should be aware of the dynamics of violence against women in the home.

740. The Federal Court also has taken a number of initiatives to promote awareness of gender issues. These include forming a gender issues committee at a senior level, enabling its judges to participate in gender issues seminars, and instigating a meeting programme between judges and female barristers appearing before the Court. The development of these programmes is to enable judges, magistrates and other decision-makers to become more aware of possible gender bias. Funding has also been provided to the Australian Institute of Judicial Administration to develop proposals for induction courses for new appointees to the judiciary.

741. In response to specific recommendations of the National Committee for Violence Against Women, the Government provided some funding in 1993-1994 to the Family Court (and the Family Court of Western Australia) for the development of a gender awareness programme for judges and other decision-makers.

742. In relation to the teaching of law, funding was made available through the National Priority (Reserve) Fund administered by the Department of Employment, Education and Training, for the preparation of gender-inclusive case study materials for use in core curriculum areas in undergraduate law courses.

743. In relation to cross-cultural awareness, the Australian Institute of Judicial Administration has initiated projects on a range of related topics.

744. The Federal Court has formed an Aboriginal and Torres Strait Islander cultural awareness committee, which is offering programmes in cultural awareness for the Court's staff in each of its eight registries. It is also developing voluntary programmes for judges of the Court.

745. The National Native Title Tribunal has undertaken Aboriginal cross-cultural awareness-raising programmes, in which Federal Court judges also participate.

746. The Administrative Appeals Tribunal also conducts professional development training for tribunal members, which includes topics such as gender and cross-cultural issues.

## Juries

747. In Australia, the right to trial by jury applies in relation to indictable offences. In relation to indictable offences against federal law, the right to trial by jury is guaranteed by section 80 of the Australian Constitution. Section 80 provides:

> "The trial on indictment of any offence against any law of the Commonwealth shall be by jury, and every trial shall be held in the

> State where the offence was committed, and if the offence was not committed within any State the trial shall be held at such place or places as the (Federal) Parliament prescribes."

748. The High Court has held that this constitutional right requires that a guilty verdict be returned in federal offences only where there is the consensus of all jurors (Cheatle v. The Queen (1993) 177 CLR 591). Four states and one territory currently have provision for majority verdicts. They are South Australia, Western Australia, Tasmania, Victoria and the Northern Territory. Where a federal offence is tried in one of those jurisdictions, a majority verdict is not permitted.

749. In some jurisdictions, the accused has the right to elect trial by judge alone. In relation to Federal offences, however, in Brown v. R (1986) 160 CLR 171; 60 ALJR 257, a majority of the High Court held that section 80 of the Constitution operates to prevent a person indicted on a federal offence from so electing.

750. In most jurisdictions a defendant to less serious criminal charges before a summary court has the right to have the matter heard to finality before a magistrate, rather than be committed for trial before a judge and jury. Minor criminal, traffic and regulatory offences are dealt with by hearing before a magistrate in a court of summary jurisdiction, with no right to trial by jury. In civil cases, the trial is usually before a judge alone. Juries may be used in some litigation, for example defamation cases.

751. Federal and state legislation govern jury service. The Federal Jury Exemption Act 1965 and Regulations exempt certain persons from such service, such as Members of Parliament, federal police officers, and certain members of the defence force. Officers or employees of the High Court, the Federal Court and the Family Court of Australia, members of the legal profession and certain other classes of persons are also exempt from liability to serve as jurors.

752. In the Australian Capital Territory, the Juries Act 1967 provides that a person is disqualified from jury service if he or she has been convicted for certain (usually serious criminal) offences, is an undischarged bankrupt, is unable to read and speak English, is blind, deaf or dumb, is incapable of serving as a juror by reason of mental or physical disability, is of unsound mind or is involved in the administration of justice. The Act also provides that the following persons, among others, are exempt from serving as jurors: ministers of religion, practising barristers, solicitors, medical practitioners, newspaper editors, and people over 60 years of age. The Sheriff or Judge may also excuse certain people, such as pregnant women, or a person who is suffering with an illness. There is no discrimination on the grounds of sex, race, religion or membership of a political group.

753. In Victoria, the Juries Act 1967 provides for similar exemptions from jury service. A Victorian parliamentary committee is conducting a review of these exemptions. The review is a result of concern that the current composition of juries does not properly reflect the general community, which weakens the essential purpose of the jury system, that is to provide a trial by one's peers.

754. In criminal matters, a party may raise an objection to the constitution of the jury with the court before the trial commences. An accused person has a statutory right to a certain number of peremptory (without cause) challenges to prospective jurors and an unlimited number for cause.

Equality before the courts

755. In general, all people are equal before Australian courts and tribunals. In Queensland, however, pursuant to the Public Trustee Act 1978, a prisoner convicted of an indictable offence and serving a sentence of three years or more may be required to have his or her estate managed by the Public Trustee. The effect of such management (under section 95 of that Act) is that the prisoner is incapable of bringing or defending any action of a property nature or for the recovery of any debt or damage without the written consent of the Public Trustee.

756. While not strictly constituting exceptions to the general principle of equality before the law, there are some further procedural restrictions which may prevent certain persons, for example, children and persons of unsound mind, from pursuing a right of action in a court personally. Actions may, however, be brought on behalf of these people by next of kin or guardians or other special provision. For example, under the Federal Family Law Act 1975, a court may order separate legal representation for a child involved in custody or other proceedings under the Act and make any orders necessary to secure it. The child also has a right to apply for separate legal representation in such matters.

Public hearings

757. Except where express provision is made to the contrary, all Australian courts are open courts. Consequently court proceedings are held in such a place and under such circumstances that it is plain to an interested member of the public that he or she has a right of free access to them.

758. Most jurisdictions place restrictions on public access, including the media, to trials involving children. Examples of limitations to public access follow.

> In New South Wales, the Children (Criminal Proceedings) Act 1987 provides that the general public is to be excluded from criminal proceedings to which a child is a party. However, people who are engaged in preparing a report on the proceedings for dissemination through a public news medium are entitled to remain while proceedings are being heard, unless the court otherwise directs;
>
> In South Australia, an order must be made requiring persons to absent themselves from the court if the victim of an alleged sexual offence is a child. In such a case, the court may, upon the application of a person against whom such an order operates, make available a transcript of evidence and a record of proceedings;

Proceedings before the Family Court are open to the public but the presiding judge has the discretion to exclude a person or persons or to close the court; and

Some hearings before tribunals may also be in camera.

## Publication of court proceedings

759. Major decisions of federal and state courts are published in law reports. Some tribunals also publish their findings in similar reports. Where proceedings are open to the public, the press is also able to publish details of the proceedings. Publication of the proceedings of open courts by the press is subject to the discretion of the judge or magistrate to forbid publication of evidence absolutely or subject to conditions. The discretion will be exercised if publication is likely to prejudice the administration of justice. The court also has discretion to prohibit the publication of the names of parties or witnesses in the interests of the administration of justice. In the case of the Family Court, legislation provides that the parties, "their witnesses, associates or alleged associates", may not be identified in any way in communications to the public, for example in newspapers, radio or television.

760. In Queensland, the Children's Services Act 1965 prohibits the publication of any report which will identify or could lead to the identification of a child. Publication is only possible by express order of a court. In addition, the Juvenile Justice Act 1992 prohibits the publication of any identifying matter relating to criminal proceedings against a child.

761. Transcripts of proceedings in the Federal Court, the High Court, the Australian Industrial Relations Commission, the Family Court and the Administrative Appeals Tribunal are available through Auscript, the Federal Government's court reporting service. Until 1989, transcripts were available free of charge to the courts and to parties, the Federal Government subsidizing Auscript for this purpose. Since 1989, Auscript has undergone a process of commercialization and the cost of transcripts is now borne by those who request them. Currently, the Federal Government is considering technological options that could assist in increasing the availability of transcripts to individual litigants and reduce the costs of those transcripts.

## Contempt of court

762. Common law principles concerned with the powers of a court to deal with matters such as maintenance of order in a courtroom, attempts to influence participants in a case (including by publication of material), public denigration of judges and intentional disobedience of court orders are referred to as contempt of court.

763. Publications may constitute contempt of court if they create a real risk of prejudice to one of the parties to a hearing which is pending. Contempt of court rules also cover publication of matters likely to prejudice

the mind of a court by putting it in possession of information which it ought not to have had, and which would embarrass it in the task of deciding the case fairly and free from prejudice.

764. In April 1983 the Australian Law Reform Commission (ALRC) commenced a review of the law of contempt applied by courts exercising a federal jurisdiction. Its final report, entitled "Contempt", was published in 1987. The ALRC expressed concern that contempt in the face of the court is tried summarily by the presiding judge, in actual or potential conflict with the provisions of article 14 that require an independent and impartial tribunal to hear charges. The ALRC considered the appropriateness of this procedure seriously open to question and made the observation that even if the conflict is not real - but only apparent - the image of the judicial system in the public eye may be tarnished. In conclusion, the Commission made the following recommendations relevant to article 14.

> A series of offences, specifying what forms of conduct in or near a courtroom should be deemed unacceptable, should replace the present broad criterion of liability for contempt in the face of the court.
>
> A person accused of any of these offences should not be tried by the presiding judge unless both this person and the presiding judge consent to this mode of trial.
>
> The power of the presiding judge to resort to alternative means of dealing with improper conduct - in particular, ordering that the relevant individual or individuals be removed from the courtroom - should be preserved.

765. A discussion paper on the ALRC report was circulated for comment in mid-1991 and subsequently referred to the Standing Committee of Attorneys-General, along with a paper outlining the Federal Government's position. A draft model bill, based on the recommendations in the position paper, was approved in May 1993.

Presumption of innocence

766. It is a fundamental precept of the Australian system of administration of justice that an accused person is presumed innocent until proven guilty. It is the task of the prosecution in criminal trials to prove each element of its case "beyond reasonable doubt" (unless the law creating the offence applies a different standard of proof). However, in certain circumstances, legislation will reverse the onus of proof and require the person charged with the offence to prove (or, more likely, to disprove) a certain element of the defence. It is federal criminal law policy that a persuasive onus should not be imposed on a defendant in criminal proceedings except in clear and exceptional circumstances. Draft federal legislation is scrutinized by the Senate Standing Committee for the Scrutiny of Bills to ensure that the defendant has the persuasive onus of proof only where:

> The matters to be raised by way of defence by the accused are particularly within the knowledge of the accused; and

> It would be extremely difficult and costly for the prosecution to be required to negative the defence.

767. The burden of proof on the accused in these circumstances is the civil standard of proof, namely, on the balance of probabilities.

768. In some circumstances, in particular where the accused wishes to rely on an exception or defence provided by the law, the accused bears an evidential burden of proof. An evidential burden means the burden of adducing or pointing to evidence that suggests a reasonable possibility that the matter exists or does not exist. For example, the defence of reasonable and honest mistake only requires the defendant to put the matter in issue, then the onus is on the prosecution to disprove it (He Kaw Teh v. R (1984-85) 157 CLR 523).

769. The Federal Criminal Code Act 1995 codifies and clarifies the existing law in the area. The Code will come into operation progressively towards the year 2000.

### Paragraph 3 (a)

#### Prompt information of charges

770. Where a person is arrested, the common law and, in some instances, legislation require information about the reasons for arrest to be given at the time of arrest. If a person is not arrested, but proceeded against by summons, all jurisdictions require that the nature and cause of a charge are to be included in the documents necessary to enable the court to commence hearing a matter. Legislation in some jurisdictions stipulates that the documents give the accused reasonable information of the nature of the charge or "state shortly the matter of the complaint" and in others, provides for prescribed forms to be completed. These forms invariably require a brief reference to the nature of the complaint. The detail required does not extend to divulging the name of any person as a result of whose information charges have been laid. The accused is entitled to a copy of these documents.

771. In relation to the trial, the accused must also be informed of the identity of the prosecution witnesses and the nature of the evidence. If available material evidence is withheld, a conviction can be quashed by an appeal court.

#### Information in other languages

772. Section 23N of the Crimes Act 1914 provides a right to an interpreter for a non-English-speaking person during police questioning. Once the investigating official has reasonable grounds to believe the accused person cannot communicate in a reasonably fluent manner, questioning and investigation cannot begin or continue until an interpreter is present.

773. The Crimes Act 1914 also requires the cautioning of suspects in a language that they understand and the provision of information to the arrested person on his or her right to contact a friend or relative and a lawyer, and the right to have a lawyer present during questioning.

774. Section 23H of the Act includes specific safeguards for Aboriginal and Torres Strait Islander peoples. Aboriginal and Torres Strait Islander people are entitled to have a friend present at the interview (including a lawyer, a relative, an Aboriginal legal aid worker, or another person chosen by the arrested person).

775. Provision has been made for the collation of a list of people who are willing to help or to act as interpreters for Aboriginal or Torres Strait Islander people who are under arrest or investigation for federal offences.

776. Furthermore, an Aboriginal legal aid organization must be notified of the person's arrest. Additional funding was provided to Aboriginal Legal Services, following the recommendations of the Royal Commission into Aboriginal Deaths in Custody, to enable Aboriginal Legal Services to provide additional services, such as being available to assist arrested Aboriginal and Torres Strait Islander people.

777. In its report, entitled "Multiculturalism and the law", the Australian Law Reform Commission (ALRC) recommended that sections 23H, 23K and 23N of the Crimes Act 1914 be amended to require that an interview friend or interpreter be present when the investigating official has reasonable grounds to believe that one is needed (para. 3.54). The Commission considered that the current standard (namely that the official believes on reasonable grounds that a person who is under arrest is an Aboriginal or Torres Strait Islander, under 18 years or cannot communicate orally with reasonable fluency in English) is too high. The current standard requires that there be reasonable grounds for the belief and the officer must in fact have the belief. This report is under consideration by the Government.

778. The 1994 Access to Justice Report recommended that the Federal Government through the Standing Committee of Attorneys-General continue to encourage the states to enact legislation that guarantees a right to an interpreter throughout the criminal investigation process. This is particularly important given the small proportion of charges that are investigated under the Federal Act.

779. Legislation in the Australian Capital Territory, South Australia and Victoria requires use of interpreters during police questioning. Some other states are reviewing their statutory provisions concerning the use of interpreters. In New South Wales, the Attorney-General has established a working party in conjunction with the Ethnic Affairs Commission to review and evaluate the role and use of interpreters within the state's legal system. In Queensland, in response to the Federal Attorney-General's Access to Interpreters in the Legal System Report 1991, the Criminal Code provisions are in the process of being reviewed. In Tasmania, the Criminal Law (Detention and Interrogation) Act 1995 provides an arrested person with the right to an interpreter during questioning to enable the person in custody to understand the question.

Paragraph 3 (b)

780. In Australia, an accused person must be given adequate opportunity to prepare his or her defence. If the trial is due to take place before the accused has had sufficient opportunity to prepare a defence, the courts have power to adjourn the hearing to a later date and almost invariably do so - refusing to do so only when they consider the interests of justice would not be served by such adjournment.

781. The right of a person charged with a criminal offence, who is in custody without bail, to communicate with his or her counsel for the purpose of preparing a defence, is recognized throughout Australia. The right to communicate with counsel is subject to regulation by law in some jurisdictions. For example, in the Northern Territory, visits to a prisoner by his or her legal representative may be made at reasonable times and with the consent of the Director of Correctional Services.

Paragraph 3 (c)

782. There is normally no delay in a court disposing of the matter when a person pleads guilty to a criminal charge. Delays (variable between jurisdictions) do occur in bringing defended matters to trial. The length of time involved depends on the availability of courts, magistrates and judges, as well as on the circumstances of the case, for example, the time required by the defence to prepare its case or the time it takes to have counsel available.

783. The criminal laws in several states provide for an accused person to make application to the court to be brought to trial and for his or her discharge if an indictment is not presented within a certain time following a successful application. The courts have an inherent jurisdiction to dismiss or stay proceedings where it is found, through lapse of time or for other reasons, that the accused cannot receive a fair trial. The following statistics are not complete, but give an indication of the position in some jurisdictions:

> Arrest and formal charging with an offence: in Western Australia charging is immediate. This is the case in most jurisdictions;
>
> Charging with an offence and beginning of the trial: in Western Australia - two to four months; in South Australia - three to four months;
>
> Beginning of the trial and completion of the trial or sentence: variable depending on the nature of the trial;
>
> Initiation of appeal and disposition of appeal: in Western Australia approximately four months.

784. In the more remote areas of Australia, a special problem of delay before trial may arise where a court may not always be immediately available to hear charges. Language difficulties may also sometimes present a barrier to prompt commencement of proceedings. However, every effort is made to keep

such delays to a minimum. In the Northern Territory, for example, circuit magistrates courts travel to larger towns in outlying areas twice a month and at least once a month to the remoter areas. Whenever necessary, a special court can be convened consisting of one or two justices.

785. The Australian Capital Territory has adopted a process which is intended to bring a person charged with an offence before the court as quickly as possible. At present the delay between the charge and the person's appearance in court may be up to six months. Under the procedure, where a person is charged with an offence, he or she may sign a voluntary agreement to attend court. This enables the police to proceed without having to arrest the person or issue a summons. In return for the signing of the agreement, the police will undertake to have the case in court within 10 working days. When the case reaches court, it is dealt with in the normal way. The scheme applies to children as well as to adults.

### Paragraph 3 (d)

- Trial in presence of the accused

786. A trial will not proceed, except in exceptional circumstances, without the presence of the accused. Where the accused creates such a disturbance in court that it is impossible to proceed with the trial, the accused may be removed but the trial will not proceed without the accused's legal representative being present. The accused is also entitled to access to a transcript of the proceedings, including any proceedings conducted during his or her absence.

#### Ex parte proceedings

787. In summary matters where a summons has been served and the defendant does not appear, courts have a discretion to proceed *ex parte* to hear and determine the case in the absence of the defendant. In some jurisdictions a defendant may opt to enter a plea of guilty by post, for example in respect of minor traffic offences, and the proceedings can then be determined in the absence of the defendant. The court would in such instances be required to have regard to any matters addressed in the defendant's written statement.

#### Right to defend a charge and the right to legal assistance

788. The entitlement of any person to defend a charge either in person, or through counsel, is recognized throughout Australia. Where an accused person is unrepresented, in particular in serious criminal offences, the court will normally advise that the person may seek legal representation and seek legal aid for that purpose.

789. In *McInnes v. R* (1979) 27 ALR 449 the High Court considered that a person did have a right to be represented by counsel, but this right was qualified at least to the extent that the interests of the Crown, of witnesses and jurors and of the administration of justice needed to be taken into account. Accordingly, a trial judge has a discretion to order a trial to proceed where the accused is unrepresented but has expressed a wish to be represented, provided no miscarriage of justice occurs. The exercise of this

discretion is subject to review on appeal. The appeal court would be concerned to ensure that no miscarriage of justice had occurred. The court would make an assessment of the chances of the accused gaining acquittal had he or she been represented.

790. In Dietrich v. R (1992) 177 CLR 292 the High Court considered what approach should be adopted by a trial judge who is faced with an application for an adjournment or a stay by an accused charged with a serious offence who, through no fault on his or her part, is unable to obtain legal representation. The High Court found that, if in these circumstances an application that the trial be delayed is refused and, by reason of the lack of representation of the accused, the resulting trial is not a fair one, any conviction of the accused may be quashed by an appellate court for the reason that there has been a miscarriage of justice in that the accused has been convicted without a fair trial.

791. Legal aid is provided by a broad range of organizations. The major providers of legal aid in Australia and their major sources of funding are as follows:

> Legal aid commissions (LACs) in each state, which are funded jointly by federal and state governments (including moneys derived from interest on solicitors' trust accounts);
>
> One-hundred and twenty-six community legal centres, which are funded either by federal or by state governments, or both; some are assisted (usually in kind rather than through direct funding) by local governments;
>
> Aboriginal Legal Services, which are funded primarily by the Aboriginal and Torres Strait Islander Commission;
>
> A range of statutory and non-statutory schemes, which are funded by the Federal Attorney-General's Department through the Office of Legal Aid and Family Services;
>
> Chamber magistrates in New South Wales, who provide legal assistance and are funded by the State Government;
>
> The Public Defenders Office in New South Wales, which undertakes criminal legal aid matters and is funded by the State Government; and
>
> The private legal profession, in that LACs spend a significant amount of their budgets on referrals to private lawyers. In return, private lawyers accept 80 per cent (or less) of scale fees for most legal aid matters. They also provide volunteer legal services for community legal centres and undertake pro bono work.

792. LACs are the largest providers of legal services, accounting for a little over 80 per cent of the total government spending on legal aid (including interest on trust accounts). Of the funding given to LACs, the

Federal Government is the largest contributor, providing 57.4 per cent of government contributions. Table 17 shows the source of funds for LACs from 1987 to 1993.

793. In relation to the statutory and non-statutory schemes administered by the Federal Attorney-General's Department mentioned above, financial assistance may be provided in test cases for the purpose of resolving an important question of federal law that, in the opinion of the Attorney-General, affects the rights of a section of the public which is, or a group of persons who are, for the most part, socially or economically disadvantaged. In addition to meeting specified statutory criteria, applicants need to be able to demonstrate hardship and that the case has reasonable prospects of success. The following are the statutory and non-statutory schemes under which the Attorney-General is empowered to authorize legal or financial assistance. The statutory schemes are:

Aboriginal and Torres Strait Islander Heritage Protection Act 1984 (section 30 (2));

Aboriginal Land Rights (Northern Territory) Act 1976 (section 54C);

Administrative Appeals Tribunal Act 1975 (section 72);

Australian Security Intelligence Organisation Act 1979 (section 72);

Conciliation and Arbitration Act 1904 (sections 132H, 132J, 141A, 141B and 168);

Defence Force Discipline Appeals Regulations (regulation 11);

Disability Discrimination Act 1992 (sections 105 and 106);

Federal Proceedings (Costs) Act 1981;

Freedom of Information Act 1982 (section 66);

Industrial Relations Act 1988 (section 342);

Judiciary Act 1903 (section 69 (3));

Jurisdiction of Courts (Cross-vesting) Act 1987 (section 6 (5));

National Crime Authority Act 1984 (section 27);

Native Title Act 1993;

Navigation (Marine Casualty) Regulations (regulation 29);

Privacy Act 1988 (section 102);

Proceeds of Crime Act 1987 (section 102);

Racial Discrimination Act 1975 (sections 25ZB and 25ZC);

Sex Discrimination Act 1984 (sections 83 and 84);

Trade Practices Act 1974 (section 170);

War Crimes Act 1945 (section 19); and

War Veterans Act (section 69).

794. The non-statutory schemes are:

Environmental cases;

Overseas custody (child removal) cases;

Overseas special circumstances cases;

Royal Commissions and inquiries cases; and

Special circumstances cases.

Access to legal assistance

795. Access to legal assistance is one of the guarantees accorded to persons facing criminal charges in order to ensure the right to a fair hearing. The right to legal assistance outlined in article 14 is reinforced in Australian domestic law by the decision of the High Court in R v. Dietrich (1992) 177 CLR 292. In this case the majority held that where an accused charged with a serious offence, who through no fault of his or her own cannot obtain legal representation, applies for an adjournment or a stay, then other than in exceptional circumstances the trial should be stayed until legal representation is made available. This case effectively puts an obligation upon governments to fund defences in certain serious cases. The significant fact of Dietrich is that the majority stipulated that it depends on the circumstances of each case whether lack of legal representation constitutes an unfair trial.

796. The LACs have adopted the philosophy that, generally, legally assisted persons should have the right to choose their own solicitor. In fact this philosophy is embodied in legislation establishing legal aid commissions. In recent years, however, some commissions have introduced "availability rules". These rules, although they have been given only restricted application, permit legal aid commissions to deny legally assisted clients their solicitor of choice. For example, the LACs of the Australian Capital Territory, Victoria and New South Wales (LACNSW), have such a rule operating in criminal matters, so that if the Indictable Section has the capacity to handle a matter, it does so. The LACNSW also does not allow a legally assisted person his or her chosen solicitor in respect of criminal matters heard in a court of petty sessions as assistance is available through the duty solicitor service operated by the Commission.

797. While not being regarded as criminals, persons detained under the Migration Act 1958 are entitled to seek legal assistance. If legal aid is refused to an alien because of his or her non-resident status then, when the circumstances of the case are not considered, under the High Court ruling in R v. Dietrich the defendant may be entitled to appeal.

Eligibility for legal assistance

798. Eligibility for legal assistance in relation to less serious matters can vary depending on the scheme under which assistance is sought and the body that assistance is sought from. Legal aid schemes in Australia usually include means testing as part of the application process. In the public interest, it is also usual for those who can afford to make a financial contribution towards the cost of their assistance to be required to do so. Assistance is subject to considerations regarding the type of matter for which assistance is sought, the means of the applicant, the merits of the case and the availability of funds.

799. In 1994, the "Access to justice" report concluded that the Federal Government had not been sufficiently energetic and innovative in legal aid policy. The report stated that there had been a lack of strategic direction at the national level that had resulted in inefficiencies and unequal access to legal aid.

800. Steps have been taken to ensure the best use of public resources to assist those in need of legal assistance. The principal reforms in this area involved improving the efficiency of key legal institutions and reducing the demand for legal services, for example, by expanding mediation and counselling in family law and sponsoring community-based crime prevention.

Paragraph 3 (e)

801. The general rule in all jurisdictions is that an accused person or that person's legal representative is entitled to examine or cross-examine any other party who gives evidence. The accused may secure the attendance of any compellable witness by the issue of a subpoena or summons which compels the person on whom it is served to attend the court. This rule applies both to the prosecution and the defence. Some potential witnesses, such as children and mentally incapacitated persons, may not be competent witnesses and are thus not compellable. There are also some residual exceptions in relation to spouses. Otherwise, the general rule is that anyone is a competent and compellable witness in any case. If the witness so compelled fails to attend, the court may issue a warrant to bring that witness.

802. Certain information may be protected from disclosure by a claim to privilege. There are a limited number of categories of privilege, for example, "Crown" privilege and some protection for communications between legal adviser and client. A claim of privilege may be made by both the prosecution and defence. The court will consider whether a claim for privilege is established but a successful claim of privilege does not affect the right to compel the attendance of a witness. One important area, the privilege against self-incrimination, is addressed below in regard to article 14.3 (g).

### Paragraph 3 (f)

803. The practice is that, if interpreters are required in criminal cases, their attendance is arranged without cost to the defendant. In cases where there is a problem of communication, courts go to considerable lengths to ensure that accused persons understand the nature of the charge and evidence against them. Permission to use an interpreter is given by the courts as a matter of course. If an accused person arranges his or her own interpreter, that is also permitted as a matter of course. The Federal Access and Equity strategy requires that police and judicial agencies which are funded by the Federal Government provide access to professional interpreters wherever necessary.

804. The Family Court provides interpreters free of charge to parties during counselling or mediation sessions. An interpreter is provided if a party requests one or if a counsellor or mediator considers that a party cannot adequately understand and speak English. Registry staff also offer assistance to people with limited English who attend at Federal Court registries, either by using the skills of multilingual staff or arranging for access to the Telephone Interpreter Service. More recently, the Court has introduced interpreter-assisted divorce lists in its Sydney registry, with Mandarin and Cantonese interpreters in attendance. For people with a hearing impairment, sign language interpreters are provided.

805. There is no statutory right to an interpreter in federal tribunals. However, a number of tribunals have policies or guidelines under which interpreters are generally provided where needed. The Administrative Appeals Tribunal provides interpreters when needed to interpret proceedings for parties and evidence for witnesses. Guidelines of the Social Security Appeals Tribunal recognize the need for, and importance of, interpreters and the manner in which interpreters are to be provided. Applicants can indicate on their application form their wish to have an interpreter in the Tribunal. Applicants are asked again when they telephone to make an appointment whether they require an interpreter. There is a statutory basis, although not an entitlement, for the provision of interpreters in the Immigration Review Tribunal and the Refugee Review Tribunal. In both tribunals, the presiding member may direct that communication with a person appearing before it be through an interpreter where the person is not proficient in English. The tribunals in practice provide interpreters wherever they are requested or appear to be needed.

806. Some states have enacted legislation to guarantee a right to an interpreter. For example, the New South Wales Evidence Act 1995 contains a provision in identical terms to the Federal Evidence Act 1995 providing all witnesses with an entitlement to give evidence through an interpreter unless they are able to understand and speak English sufficiently to understand questions and give evidence. In the Australian Capital Territory, a party or a witness is entitled to be assisted by an interpreter if unable to communicate effectively in English. In Victoria, there is a statutory right to an interpreter for witnesses and parties in proceedings in the Children's Court and in Magistrates' Court proceedings for defendants charged with an offence punishable by imprisonment, if the court is satisfied that the person does not have adequate understanding of English. In South Australia,

witnesses in any action, trial or matter have the right to an interpreter if English is not their native language and they are not reasonably fluent in English.

807. The Royal Commission into Aboriginal Deaths in Custody identified the need for Aboriginal peoples and Torres Strait Islanders to have access to an interpreter if they were unable to understand proceedings in English or if they were unable to express themselves in English. Funding was subsequently made available to establish accredited Aboriginal and Torres Strait Islander language interpreter training programmes in a variety of Aboriginal and Torres Strait Islander languages.

808. The provision of accredited Aboriginal and Torres Strait Islander language court interpreters in locations which have significant Aboriginal and Torres Strait Islander populations should create a more equitable and just court environment for Aboriginal and Torres Strait Islander language speakers.

809. Pilot interpreter training programmes have been conducted in Pitjantjatjara, for eight para-professional accredited interpreters and in Torres Strait Creole for two graduates, as well as in Walmajarri, Jaru and Kriol, resulting in 13 interpreters. In addition, funding assistance was provided to a Northern Territory college to incorporate a legal component in their interpreter training programme, which resulted in three Kriol interpreters and two Djambarrpuyngu interpreters. A further three participants have gained technical and further education certificates and with a little further work will be able to complete their para-professional accreditation.

810. Additional programmes are planned for 1996 in Western Australia in Nyangumarta and at Alice Springs in Arrernte, Western Desert and Warlpiri.

811. The proposal that uniform legislation be enacted to ensure a right to an interpreter for non-English speaking persons is under consideration by the Standing Committee of Attorneys-General (SCAG). SCAG has examined the issue of interpreters in the context of responding to the recommendations of the Federal Attorney-General's Department's report "Access to interpreters in the legal system". SCAG has recently formulated national guidelines on the availability of interpreters in courts. The Attorneys-General are awaiting the development of a national system for the registration and accreditation of interpreters, a matter which is being considered by Ethnic Affairs Ministers.

## Paragraph 3 (g)

### Police questioning

812. A person has a right to remain silent in response to police questioning in respect of an offence. If the person chooses to answer, statements made may be tendered in evidence in later proceedings. Police Commissioners' Instructions commonly provide that police are to warn suspects of the possibility of their statements being tendered in evidence at later proceedings.

813. There are some legislative requirements to answer certain questions from police, but generally these relate to such matters as the provision of names and addresses of persons present at the scene of traffic accidents. In Victoria, the requirement to provide name and address is broader. Section 456AA of the Crimes Act 1958 makes non-compliance with the request of a police officer for name and address an offence in certain circumstances. They are if the police officer believes on reasonable grounds that the person has committed, or is about to commit, an offence or if the officer believes on reasonable grounds that the person may be able to assist in the investigation of an indictable offence.

814. Under the common law, a confession to a crime by an accused person is only admissible if it is voluntary. A confession made in consequence of a threat or inducement held out by a person in authority may be held by a court to be involuntary and, therefore, inadmissible.

815. In New South Wales, the Australian Capital Territory and Federal courts the voluntariness rule has been replaced by a reliability rule. In these jurisdictions evidence of a confession is not admissible unless the confession and the making of the confession were not influenced by any violent, oppressive, inhuman or degrading conduct towards any person, or by a threat of such conduct. In addition, evidence of a confession made during official questioning, or as a result of an act of a person who can influence the prosecution, is not admissible unless the circumstances in which the confession was made were such as to make it unlikely that the truth of the confession was adversely affected. The circumstances that the court must take into account are the characteristics or conditions of the person who made the confession (such as age, personality, education and any disability), the nature of the questioning and any threat, promise or inducement. A voluntary confession would not necessarily be admissible under the reliability test.

816. Generally speaking, any confessions or admissions made by suspects must be tape-recorded where practicable. In relation to federal offences, the Federal Crimes Act 1914 provides that where it is impracticable to tape-record the confession contemporaneously, a written record of interview containing an admission or confession must be read back to the suspect, who is to be given an opportunity to refute anything contained therein. This process must be tape-recorded. In practice, video-recording is generally used and this provides the best possible indication of the reliability of the evidence. In Tasmania there is no requirement for police confessional statements to be electronically recorded. However, the Tasmanian police endeavour wherever possible to record confessional statements on video. The Criminal Law (Detention and Interrogation) Act 1995 makes it mandatory for the police to videotape the interview during which a confession or admission is made unless it is impracticable to do so, or if the police have a reasonable explanation as to why the videotape recording could not be made. The Act sets out what is a reasonable explanation for these purposes.

### Court testimony

817. In most jurisdictions the accused is competent but not compellable to give evidence as a witness for himself or herself or a co-accused. Thus, an

accused person is not required to give evidence in his or her own trial and will not be guilty of contempt of court if he or she chooses not to give evidence. In some Australian jurisdictions there is also a statutory prohibition on judicial comment on an accused person's failure to give evidence.

818. Generally, an accused person has the choice of remaining silent, or giving evidence on oath. In Norfolk Island an accused person may also make an unsworn statement. Where an accused person chooses to give evidence on oath there are rules of evidence law which limit the scope of permissible cross-examination, for example, as to the accused person's credibility.

### Self-incrimination

819. Some legislation exists in Australia to compel the giving of evidence, but this is made subject to certain safeguards. For example, a certification procedure exists under the Federal and New South Wales Evidence Acts. Under the Federal Evidence Act 1995, except in the case of testimony that may tend to prove the commission of a foreign offence, a Federal or Australian Capital Territory court may require a witness to give self-incriminating testimony where the interests of justice require that the witnesses do so. Where a court requires a witness to give such testimony, it must cause the witness to be given a certificate which gives the witness both use and derivative use immunity and protection in respect of the evidence. Neither the testimony in respect of which the certificate has been given, nor evidence of any information, document or thing obtained as a direct or indirect consequence of the witness having testified, can be used against the witness in any proceeding before an Australian court, except in criminal proceedings in respect of the falsity of the testimony.

### Children

820. Detailed information on children and the justice system is provided in paragraphs 1391 to 1482 of Australia's first report under the Convention on the Rights of the Child.

### Appeal rights

821. The right to have a conviction and sentence reviewed by a higher tribunal according to law is provided for by legislation in all Australian jurisdictions. Prerogative writs (discussed in the core document) are also available. In some cases an appeal is subject to the leave of the higher court. The necessity to seek leave is a means of ensuring that an appeal is made on proper grounds and, in practice, leave is never refused if a properly based appeal is made within the prescribed time. The ultimate court of appeal for all jurisdictions is the High Court of Australia.

822. Each jurisdiction has an appeal process provided by statute. In New South Wales, appeals against the sentence imposed by a local court may be made to the district court. The only limit on a person's right to have the sentence reviewed is the time within which an appeal must be lodged. A person convicted of an offence by the Supreme Court in its summary jurisdiction may appeal to the Court of Criminal Appeal against the sentence

imposed. Any such appeal shall be by way of rehearing the evidence. With respect to indictable offences, a person may, with the leave of the court, appeal to the Court of Criminal Appeal against the sentence passed.

823. In South Australia, a person convicted of a crime on complaint may appeal to the Supreme Court. A person convicted of a crime on information may, subject to the leave of the court, appeal to the Full Court of the Supreme Court to have his or her sentence reduced. On appeal against sentence, the Full Court shall, if it thinks that a different sentence should have been passed, quash the sentence passed at the trial and pass such sentence as is warranted in law, or dismiss the appeal. A sentence can only be increased if the Director of Public Prosecutions applies with the leave of the Full Court and the application is granted by the Full Court.

Compensation for miscarriage of justice

824. Australia has maintained the following reservation in respect of this paragraph:

> "Australia makes the reservation that the provision of compensation for miscarriage of justice in the circumstances contemplated in paragraph 6 of Article 14 may be by administrative procedures rather than pursuant to specific legal provision."

825. Administrative procedures are available in all jurisdictions to provide compensation for miscarriage of justice in the circumstances envisaged in paragraph 6 of this article. The reason for maintaining Australia's reservation to article 14 was the requirement in paragraph 6 of that article for statutory compensation in cases of miscarriage of justice, whereas in Australia the procedures for granting compensation do not necessarily have a statutory basis. The compensation procedure for miscarriage of justice relates to situations where there has been judicial error, not to errors that might have been committed by a jury.

Double jeopardy

826. Australian law recognizes the rule against double jeopardy, which is the foundation of the pleas of autrefois acquit and autrefois convict. In the case of Davern v. Messel (1984) 53 ALR1 1, two principles on the limitations of the rule were laid down by the majority of the High Court:

> Where the accused has been convicted and has himself or herself invoked the appellate procedure the rule against double jeopardy has no application; and
>
> The rule against double jeopardy does not prevent a higher court from correcting an error into which a lower court has fallen in quashing a conviction.

827. Section 4C (1) of the Federal Crimes Act 1914 recognizes that double jeopardy may arise under federal laws. It provides that where an act or omission constitutes an offence under two or more federal laws or both under a federal law and at common law the offender shall, unless the contrary

intention appears, be liable to be prosecuted and punished under either or any of those federal laws or at common law, but shall not be liable to be punished twice for the same act or omission.

828. Section 4C (2) of the Federal Crimes Act 1914 provides that where an act or omission constitutes an offence under both a federal law and a state law and the offender has been punished for that offence under the state law, the offender shall not be liable to be punished for the offence under the federal law.

## Article 15

### Retrospective criminal laws

829. The general rule in all Australian jurisdictions is that legislation that results in a change in the law does not apply to past facts or events, thereby affecting previously existing rights, privileges, obligations or liabilities, unless the contrary intention appears either in the legislation or accompanying documentation. Accordingly, unless Parliament expressly so provides, no charges can be laid in relation to an act that did not constitute a criminal offence at the time it was performed. Such retrospective criminal legislation would be contrary to Australian political traditions. It is clear from existing case law that although the principle of non-retrospectivity in the application of criminal law is not constitutionally guaranteed, it is regarded with great importance by both Parliament and the courts, and is derogated from only in exceptional circumstances. Guarding against any diminution of the presumption against retrospective effect is one of the longest-standing features of the Senate Scrutiny of Bills and Regulations and Ordinances Committee's common terms of reference to ensure that legislative proposals do not trespass unduly on personal rights and freedoms. Similar committees of the state legislatures have like terms of reference in this regard.

830. In Polyukhovich v. Commonwealth (1991) 172 CLR 501 the High Court nevertheless upheld the validity of legislation in the form of an amendment to the War Crimes Act 1945 which provided that a person committed a "war crime" if between 1 September 1939 and 8 May 1945 a person committed a serious crime (defined to include murder) in the course of war.

831. In its decision the High Court acknowledged the dangers and possible injustice in retrospectively creating criminal offences and acknowledged that non-retrospectivity of criminal law is a fundamental principle of international law. However, the court reasoned that in the case of very serious moral transgressions there is a strong argument that the public interest in seeing the transgressors called to account outweighs the need of society to protect an individual from prosecution on the basis that a law did not exist at the time of the conduct.

832. Another situation in which these issues arose was the retrospective amendment of section 154 of the Criminal Code of the Northern Territory in a bill passed in February 1991. The purpose of the retrospective amendment was to reverse an advisory opinion of the Northern Territory Court of Criminal Appeal in December 1990 which confined application of the section.

833. Section 154 of the Criminal Code makes it an offence for a person to do or make any act or omission that causes serious danger to the public, or any member of it, in circumstances where an ordinary person would have clearly foreseen the danger. The court held that the relevant risk was to the public or a member of it, rather than someone actually known by the accused. The Northern Territory Government passed retrospective amendments to ensure that the section would also apply to offenders who are known to the victim. It was reluctant to pass a retrospective criminal amendment, but did so in this case for the following reasons:

> An appeal to the High Court was barred on constitutional grounds; and
>
> To do otherwise would result in injustice (for example, domestic violence offenders being acquitted or, on the other hand, being tried for more serious crimes).

Alterations in penalties

834. The common law presumption against retrospectivity referred to above is equally relevant in relation to alterations of penalties. In general, courts will presume that an increase in penalty is not to be retrospectively applied unless Parliament clearly intends otherwise. This is clear from the existing jurisprudence on this issue. In Samuels v. Sangaila (1977) 16 SASR 397, the Full Court of the South Australian Supreme Court distinguished three English cases to the contrary and held that there was a presumption against retrospective application of an increased penalty unless Parliament clearly indicated otherwise. This view was adopted by the Supreme Court of Victoria in Baker v. Stewart; Wilson v. Kerr (1979) VR 17. Further, in Hele v. Semple (1986) 42 SASR 295, the South Australian Supreme Court held that where the penalty for an offence had been reduced prior to the charge being heard, the accused should benefit from this reduction.

835. In some jurisdictions these principles have legislative force. At a federal level, section 4F of the Crimes Act 1914 provides:

> "Where an Act increases the penalty or maximum penalty for an offence, the penalty or maximum penalty as increased applies only to offences committed after the commencement of the provision of the Act increasing the penalty or maximum penalty.
>
> "Where an Act reduces the penalty or maximum penalty for an offence, the penalty or maximum penalty as reduced extends to offences committed before the commencement of the provision of the Act reducing the penalty or maximum penalty, but the reduction does not affect any penalty imposed before that commencement."

836. Similar clauses have been inserted in a number of state acts, for example, the New South Wales Interpretation Act 1987, the Victorian Interpretation of Legislation Act 1984 and the Queensland Penalties and Sentences Act 1992. Those Acts also provide that the repeal in whole or in part of an act, unless the contrary intention appears, shall not "affect any penalty, forfeiture or punishment incurred in respect of an offence committed" against that act or provision. The Interpretation Act 1978 of the

Northern Territory specifically disallows any retrospective operation of regulations, rules and by-laws that would affect the rights of a person or the liabilities imposed on a person. Section 33A of the Interpretation Act 1967 of the Australian Capital Territory is identical to section 4F of the Federal Act.

837. In Western Australia, the new Sentencing Act 1995 provides that if the statutory penalty for an offence changes between when the offender committed the offence and the time when the offender is sentenced for that offence, the lesser statutory penalty applies for the purposes of sentencing the offender. This Act has not yet been proclaimed.

## Sentencing

### Federal matters

838. A new part 1B of the Crimes Act 1914 came into effect on 17 July 1990. It consolidated and amended federal sentencing law. The amendments included sentencing guidelines. It pursues the aims of certainty and fairness. While the sentencing process is generally a discretionary one, part 1B provides matters which must be taken into account in sentencing federal offenders, such as the offender's unique antecedents, and Aboriginal and Torres Strait Islander customary laws, where relevant, must be considered in the exercise of the discretion. Section 16A (2) of the Crimes Act 1914 provides that a court "shall" take into account in sentencing matters such as this, where relevant and known to the court.

839. The Crimes Act 1914 now sets out the various factors to be taken into account when determining the sentence for a person convicted of a federal offence. The most relevant of these include:

> The nature and circumstances of the offence;
>
> The personal circumstances of any victim of the offence; and
>
> The character, antecedents, age, means and physical or mental condition of the person.

840. The requirement that imprisonment be the punishment of last resort has been strengthened. But where a court determines that a sentence of imprisonment is the appropriate penalty, that sentence is certain. Where a federal offender is sentenced to imprisonment, if the court fixes a non-parole period or makes an order for release on recognizance, this is the period that the person will actually serve in custody before parole eligibility arises or the person becomes eligible for release on recognizance. Such periods are not reduced by remissions except in the case of remissions granted by states for prison warders' strikes (subsection 19AA (4) of the Crimes Act 1914).

841. Great care was taken to ensure that establishing certainty in sentencing did not result in harsher or longer prison terms. In those states where remissions reduced non-parole periods, specific provision was made that a federal offender was to have his or her non-parole period adjusted to take

into account that it would not be reduced by remissions. The court is also required to explain to the person that the sentence of imprisonment is made up of a period to be served in custody, and a period in the community, subject to conditions either on parole or on recognizance.

State matters

842. The period of imprisonment which a convicted prisoner actually serves depends upon the sentence(s) originally handed down, the system of remissions and the forms of parole available in the various jurisdictions. The rules governing date of release are complex and differ between the states.

Australian Capital Territory

843. In the Australian Capital Territory, remandees are held in the Belconnen Remand Centre. Prisoners serve their sentences in New South Wales prisons as there are no prisons in the Australian Capital Territory. While the Australian Capital Territory offenders serve their sentences of imprisonment in New South Wales, they are sentenced according to Australian Capital Territory law. Their release on parole is also governed by Australian Capital Territory law.

844. The Australian Capital Territory Crimes Act 1990 sets out matters to which the court is to have regard in sentencing, including the nature and circumstances of the offence, the personal circumstances of the victim where those circumstances were known to the offender, the cultural background, character, age, means, antecedents and physical or mental condition of the person.

New South Wales

845. In New South Wales, prior to 1989, judges, prisoners and the community expected that any prisoner given a life sentence would serve between 11 and 15 years in prison. In 1989, "Truth in sentencing" legislation in the form of the Sentencing Act 1989 ensures that prisoners actually serve the term of imprisonment set by the courts.

846. The Crimes (Life Sentences) Amendment Act 1990, the Sentencing (Life Sentences) Amendment Act 1990 and the Prisons (Serious Offenders Review Board) Amendment Act 1990 provide for the abolition of indeterminate sentences of life imprisonment. The Crimes (Life Sentences) Amendment Act 1990 provides that any sentence of life imprisonment is to be for the term of the offender's natural life. There are now only two offences which have maximum penalties of life imprisonment: murder and trafficking of commercial quantities of drugs under the Drug Misuse and Trafficking Act 1985. All other life imprisonment penalties were replaced with a 25 year maximum sentence.

847. The Sentencing (Life Sentences) Amendment Act 1990 provides for the redetermination of existing life sentences. Any person who has served eight years of an existing life sentence may apply to the Supreme Court for a redetermination of the sentence into a minimum and additional term. The Supreme Court, at its discretion, may decline an application for

redetermination. The Supreme Court may also direct that the person who made the application never apply again to the court or only apply after a specified time. If the court directs that the person may never reapply, the person will be required to serve the existing sentence for the term of the person's natural life. The decision of the Supreme Court may be the subject of an appeal.

848. Recent initiatives in respect of rehabilitation include the Criminal Records Act 1991, proclaimed on 31 May 1991, which is administered by the New South Wales Police Service and provides for the convictions of a person to be spent if the person completes a period of crime-free behaviour (being 10 years for adults and 3 years for children). The scheme does not apply to certain convictions, including those for which a prison sentence of more than six months has been imposed and convictions for sexual offences.

## Sentencing Act 1989

849. The Sentencing Act 1989 made significant changes to sentencing. It provides for a bottom-up method of sentencing, replacing the previous top-down system. In place of the old head sentence which was then divided into a non-parole period and a period to be served on parole or probation under the Probation and Parole Act 1983, the Sentencing Act 1989 changed the way in which the date of release is calculated in New South Wales. Release dates are now calculated as follows:

> The court will first fix a minimum term that the prisoner must serve in prison, the expiry date of the minimum term will therefore be the earliest date of release.
>
> The court will then fix an additional term during which the prisoner may be released on parole.
>
> Where no additional term is set, the minimum term is known as a fixed term of imprisonment.
>
> Sentences of six months or less must be fixed terms of imprisonment.
>
> Those prisoners with sentences of three years or less will be released on parole as soon as they become eligible, those with sentences greater than three years may be released on parole by the Offenders Review Board any time after the minimum term of imprisonment expires.
>
> A prisoner's minimum term of imprisonment may be increased by a visiting justice (magistrate) by up to 28 days for each breach of prison discipline.
>
> Schedule 3 of the Sentencing Act 1989 had the effect of abolishing remissions.

Queensland

850. There is no imprisonment in Queensland "without possibility of release". Life sentence prisoners must serve 13 years in prison before being eligible for release on parole.

851. The Queensland Penalties and Sentences Act 1992 sets out sentencing guidelines which detail the purposes for which sentences may be imposed, relevant principles and factors for consideration in sentencing. Under the Act, imprisonment is a penalty of last resort. If a court imposes a sentence of imprisonment, it must state in open court its reasons for so doing.

South Australia

852. South Australia was the first Australian jurisdiction to have sentencing guidelines enacted in legislation. The Criminal Law (Sentencing) Act 1988 makes it clear that imprisonment is a punishment which is to be used only where, in all the circumstances of a particular case, it is the most suitable and appropriate form of punishment. The Act is aimed at consolidating the laws relating to sentencing and providing courts with flexibility in sentencing options (with the exception of the Children's Court which is not covered by the Act). In addition, courts are required to take into account a defendant's ability to pay before imposing a fine. The criteria which a court must consider in imposing sentences are set out in the Criminal Law (Sentencing) Act 1988. One of these criteria is the effect of the crime on the victim and to assist the court in this, victim impact statements are provided to the court.

Tasmania

853. The Criminal Code Amendment (Life Prisoners and Dangerous Criminals) Act 1994 abolished mandatory life sentences in Tasmania and provided that existing life prisoners may apply to the Supreme Court to be resentenced.

854. Where a person is sentenced to a life sentence the court must either order that the person is not eligible for parole or fix a non-parole period. In respect of all other sentences the Parole Act 1977 fixes a non-parole period of 50 per cent of the period of the sentence.

855. By regulations made under the Prisons Act 1977, prisoners may be granted remissions of sentence for good behaviour up to a maximum of three months so long as the remission does not exceed one third of the prisoner's sentence and does not reduce the length of the sentence served to less than three months.

Victoria

856. In 1991, the Victorian Government passed the Sentencing Act which was amended in 1993. The Act contains, for the first time, sentencing guidelines which outline the factors to which the courts must have regard in sentencing (sections 5 and 6). A court must not impose a sentence which is more severe than that which is necessary to achieve its purpose (section 5 (3)) and a court is not to impose a sentence that involves confinement of the offender

unless this is the only way to achieve the purposes for which the sentence is imposed (section 5 (4)). The Act expands the situations in which a court can exercise its discretion not to record a conviction and improves the range of non-custodial sentencing options available. The aim of the Act is to provide courts with flexibility in sentencing options so that the most appropriate sentence is imposed.

857. The main purposes of the Sentencing (Amendment) Act 1993 are to increase penalties for serious sexual and violent offences, to empower courts to impose indefinite sentences on persons convicted of serious offences and to create certain new offences. Young persons are defined as persons under the age of 21 years at the time of sentencing and are expressly excluded from the indefinite sentences provisions.

858. Section 3 of the Act defines a serious offence to include the following:

- Murder;

Manslaughter;

An offence against any of the following sections of the Crimes Act 1958:

Causing serious injury intentionally;

Threats to kill;

Rape;

Assault with intention to rape;

Incest in circumstances other than where both people are aged 18 years or older and each consented to engage in the sexual act;

Sexual penetration of a child under the age of 16;

Sexual relationship with a child under the age of 16;

Abduction or detention of a child under the age of 16;

Kidnapping;

Armed robbery;

An offence against a provision of the Crimes Act 1958;

The common law offences of rape and assault with intent to rape; and

Conspiracy to commit, incitement to commit or attempting to commit, any of the above offences.

859. The court may impose an indefinite sentence in respect of a serious offence regardless of the maximum penalty prescribed for the offence. The prosecution has the onus of proving that an offender is a serious danger to the community. An offender serving an indefinite sentence is not eligible to be released on parole.

860. When imposing an indefinite sentence on an offender, the court must be satisfied to a high degree of probability that the offender is a serious danger to the community and must have regard to:

Whether the nature of the serious offence is exceptional;

Anything relevant to this issue contained in the certified transcript of any proceeding against the offender in relation to a serious offence;

Any medical, psychiatric or other relevant report received by it;

The risk of serious danger to members of the community if an indefinite sentence were not imposed;

The need to protect members of the community from the risk referred to; and

Anything else the court thinks fit.

861. Review of an indefinite sentence is provided for in section 18H of the Act by an application of the Director of Public Prosecutions after the offender has served the nominal sentence, and at three yearly intervals thereafter on the application of the offender.

862. The Corrections (Remissions) Act 1991 operates in conjunction with the Sentencing Act. This Act provides for the abolition of remission and re-release permits. It ensures that convicted offenders serve the minimum term of imprisonment set by the court.

### Western Australia

863. New sentencing laws have recently been passed in Western Australia which provide a greater range of options available to courts. Specific provision is also made that a court must not use a particular sentencing option unless it is satisfied that it is not appropriate to use any of the options listed before that option. In addition, a court cannot impose a sentence of imprisonment unless either this is justified by the seriousness of the offence or imprisonment is in the interests of the protection of the community.

## Article 16

864. Under Australian common law a person acquires legal personality at birth. Thus, until birth, a person cannot possess legal rights or be owed legal duties. Nevertheless a person may realize legal rights on birth that have accrued prior to birth. This is particularly relevant in the situation

where an unborn child suffers injury through the negligence of another person. Australian courts have reasoned that a cause of action accrues if and when the child is born alive with injuries and disabilities. Similarly, where an estate or interest is created in trust for the benefit of a child in gestation, the child will acquire those rights on birth.

865. There are no circumstances under Australian law where legal personality may be derogated from or removed. All people are subjects of the law and are thus entitled to the protection of the law. However, a person's legal capacity to act may be restricted for such reasons as minority or insanity.

## Article 17

866. There is no general right to privacy in Australian law. Instead, privacy is protected by a range of federal and state legislation, the common law and administrative instructions. In particular, the Federal Privacy Act 1988 provides information privacy protection in relation to the activities of the Federal Government and some non-government activities. There are also remedies under state legislation or the common law for assault and false imprisonment (discussed above in regard to articles 6 and 7), actions for trespass onto land (discussed above in regard to article 12) and remedies for breach of confidence (discussed below in this chapter), negligence and nuisance.

867. This chapter focuses first on two areas of privacy rights: rights in relation to information held by the Federal Government and protection offered to a person's reputation by defamation laws and other media restraints. Subsequently, privacy protection in relation to the family and home is discussed.

### Information privacy

#### Privacy Act 1988

868. In 1988 the Federal Government enacted the Privacy Act 1988 which, amongst other matters, protects the information privacy of individuals in their dealings with federal government departments and agencies. Important impetuses for the enactment of the Act were Australia's ratification of the International Covenant on Civil and Political Rights in 1980 and the recommendations of the Australian Law Reform Commission's report on privacy.

869. The Privacy Act 1988 protects the information privacy of individuals in relation to their dealings with most federal government departments and agencies by establishing minimum standards for the collection, storage, use and disclosure of personal information. Together with the Freedom of Information Act 1982, it also allows individuals access to information about themselves which those departments and agencies hold, and to correct that information if necessary. These standards, called Information Privacy Principles, are based on the Organisation for Economic Co-operation and Development Guidelines on the Protection of Privacy and Transborder Flows of Personal Data.

870. Personal information is defined in the Privacy Act 1988 to mean information or an opinion, whether true or not, and whether recorded in a material form or not, about a natural person whose identity is apparent or can reasonably be ascertained from the information or opinion.

871. Certain agencies are excluded from the operation of the Information Privacy Principles on the grounds of public interest. The most important of these are security and intelligence organizations.

872. The Privacy Act 1988 also provides protection for tax file number information. Tax file numbers are unique numbers issued by the Australian Taxation Office to identify individuals, companies and others who lodge income tax returns with the Office. Following concerns that tax file numbers should not be used as the basis for a national identification system, provisions were included in the Act regulating the collection, use, security and disclosure of the numbers. Unauthorized use or disclosure of tax file numbers is also an offence under the Taxation Administration Act 1953.

873. In 1990, the Act was amended to safeguard consumer credit information held by credit providers and credit reporting agencies. The amendments limit the content of consumer credit information files compiled by credit reporting agencies and the circumstances in which they can make reports from those files. The amendments also regulate the use and disclosure of credit report information by credit providers. They give an individual rights to gain access to, and seek amendment of, credit reporting agency files, and to be informed if information from a credit reporting agency contributes to a decision by a credit provider to refuse credit to that individual.

874. The Privacy Act 1988 creates the office of the Privacy Commissioner. The Privacy Commissioner's functions include:

> Examining and reporting on legislative or other proposals which may have adverse implications for the privacy of individuals;
>
> Researching and monitoring relevant developments in data processing and computer technology;
>
> Promoting an understanding of, and encouraging compliance with, the Information Privacy Principles through publishing guidelines and delivering educational programmes; and
>
> Investigating acts or practices of federal government departments and agencies that may breach an Information Privacy Principle, both in response to complaints by individuals and as part of the Privacy Commissioner's monitoring role.

875. Individuals may complain to the Privacy Commissioner if they believe their privacy has been infringed because of a breach of the Privacy Act 1988, the Data Matching Program (Assistance and Tax) Act 1990 or the provisions protecting information about old criminal convictions in the Crimes Act 1914.

876. In relation to the Crimes Act 1914, a person whose conviction has been quashed or spent is not required to disclose the fact of that prior conviction to any person for any purpose (subsections 85ZT (1) and 85ZV (1)). Also, it is unlawful for a person who knows or who could reasonably be expected to know of another person's prior conviction to disclose (without that other person's consent) that information or to take account of that information.

877. Non-compliance with the Information Privacy Principles, the tax file number guidelines issued by the Privacy Commissioner or the credit reporting requirements contained in the Act and the Code of Conduct issued by the Privacy Commissioner is deemed to be an interference with privacy. Federal government departments and agencies and tax file number recipients must not engage in acts that amount to interferences with privacy, and credit reporting agencies and credit providers must not engage in acts that breach the Act or the Code of Conduct. A breach of the Information Privacy Principles or the tax file number guidelines does not lead to any criminal penalty or civil liability in damages. However, penalties of up to $150,000 are prescribed for various breaches of the credit reporting provisions in the Act. Individuals may complain to the Privacy Commissioner about any interference with privacy as defined by the Act. The Privacy Commissioner is empowered to independently investigate any such complaint and make determinations (including determinations in respect of payment of compensation for loss or damage suffered as a result of the breach). Determinations are binding on federal government departments or agencies. They are not, however, binding on tax file number recipients or credit providers who are not federal government agencies. In such cases the Privacy Commissioner or complainant may commence proceedings in the Federal Court. The Federal Court determines such matters de novo.

878. The Privacy Act 1988 leaves open such rights as would normally be available to restrain an interference with privacy by other civil proceedings, for example, by the grant of an injunction. In the case of a denial of access to, or refusal to correct, documents containing personal information, there are the existing remedies under the Freedom of Information Act 1982, including recourse to the Administrative Appeals Tribunal.

879. Following the release of the New South Wales Independent Commission Against Corruption report uncovering the existence of a trade in confidential information, the Federal House of Representatives Standing Committee on Legal and Constitutional Affairs conducted an inquiry into the protection of confidential information and commercial information held by the Federal Government. In its report in June 1995 the Standing Committee made a total of 39 recommendations on a range of issues, including the responsibility of senior managers for privacy and security matters, the adequacy of administrative and legal safeguards for third party information and wrongful dealings with such information, the adequacy of penalties and sanctions applying to officers who wrongly disclose information, the application and rationalization of the criminal law in its protection of confidential third party information, and remedies and compensation for third parties where information relating to them has been wrongly disclosed.

### Breach of confidence

880. In addition to the Privacy Act 1988, the law of equity in Australia recognizes a general duty of confidentiality which arises out of the special relationship between discloser and confidant. Where a person receives information which is not public property or public knowledge, the law will restrain the recipient from making unauthorized use of the information and will hold the person accountable for any profits acquired by that use. An important factor is that the recipient knew or ought to have known that the information was imparted for a limited purpose and that its disclosure was limited to the purpose for which the information was given. A person may argue a defence of disclosure in the public interest, however, this has been interpreted narrowly in Australia so that it extends only to disclosures which evidence a crime or serious wrongdoing or matters injurious to public health. However if it is the Government that claims confidentiality, unless disclosure is likely to injure the public interest (here given a wider meaning) it will not be protected.

881. There are various remedies available if a person's confidentiality is breached. In the past, courts have granted remedies such as an injunction to stop the disclosure of confidential information, account of profits and damages.

### Freedom of Information Act 1982

882. Privacy protection at a federal level is afforded to Australian adults and children alike by the right provided by the Freedom of Information Act 1982 (FOI Act) to gain access to and seek correction of records of one's own personal information held by federal departments and agencies.

883. This Act dovetails with the Privacy Act 1988 by exempting any document (therefore not requiring it to be released in response to a request for access) if the release of that document would involve the unreasonable disclosure of personal information about any other person.

884. The FOI Act also provides a consultation mechanism prior to the release of a document containing personal information about a person. This mechanism applies where a request is received for access to such a document and it appears to the officer dealing with the request that the person concerned might reasonably wish to contend that the document is an exempt document. In such circumstances, the officer must not grant access to the document unless (to the extent that it is reasonably practicable to do so) he or she has given the person concerned a reasonable opportunity to make submissions and has had regard to those submissions. There is also provision for the person concerned to seek review of a decision that the document is not exempt.

885. The then Minister for Justice initiated a review of the FOI Act. The review was jointly conducted by the Australian Law Reform Commission and the Administrative Review Council. The final report was released on 31 December 1995.

## Access to health records

886. In Australia an individual does not have an automatic right of access to health records held by private sector health care providers. In December 1995 the High Court of Australia heard an appeal against a decision of the New South Wales Court of Appeal to refuse the applicant's request for access to her medical records in the possession of a private medical practitioner (Breen v. Williams). A decision had not been made during the period covered by this report.

## Federal Government databases

### Departmental databases

887. As stated above, the collection, storage, use and disclosure of all personal information held by federal government departments is subject to the provisions of the Privacy Act 1988. There are also provisions in the Crimes Act 1914 and the Public Service Regulations under the Public Service Act 1922 that restrict the disclosure of information. Some departments, however, have additional mechanisms for protection of privacy. Two examples are given below: the Department of Social Security and the Australian Taxation Office.

888. Within the Department of Social Security, the Privacy and Review Branch in the Legal Services Division operates as a consultative body advising on questions relating to privacy. It also regularly issues national instructions and manuals outlining policies, practices and procedures to all staff relating to correct information management under all privacy legislation.

889. Furthermore, the confidentiality provisions contained in the Social Security Act 1991 protect the personal client information held by the Department of Social Security from unauthorized access (including unauthorized computer access), use, solicitation or disclosure. The confidentiality provisions expressly prohibit unauthorized access to, or disclosure of, social security recipient information, with the imposition of heavy penalties.

890. Disclosure of personal client information is permitted in certain specified circumstances, such as where the consent of the person concerned is obtained, or where the Secretary to the Department of Social Security certifies that it is in the public interest to do so, for example, to investigate serious crime, or to deal with a life threatening situation.

891. The Australian Taxation Office (ATO) is responsible for the collection of federal government taxes and as a result collects and stores personal information concerning the financial affairs of individuals and companies.

892. ATO views the unauthorized access to records very seriously and officers face criminal and/or disciplinary action if they do so. All tax officers are required to sign a secrecy agreement before they commence employment at ATO. This includes a privacy and information security document

that states that no officer will look through confidential information that is not directly part of their work. ATO has an extensive internal campaign on privacy and security to remind staff of their obligations.

893. Part of the checks and balances that are associated with the collection and processing of taxpayer information include security controls. Some of these are to prevent unauthorized staff from gaining access to taxpayer records and are computer access and password based. A member of staff is required to have a supervisor's approval to be granted access to a particular computer system. There are also audit trails to detect instances of attempts to access systems and records to which an officer may not be permitted access. When authorized staff make unauthorized access to taxpayer information, the ATO audit trails support detection and investigation action.

894. ATO follows the prosecution policy of the Federal Government as promulgated by the Federal Director of Public Prosecutions. Cases may either be dealt with by prosecution in the criminal court jurisdiction or by the ATO internal discipline process utilizing provisions of the Public Service Act.

895. In cases of unauthorized access/disclosure of taxpayer information, officers convicted of criminal offences face maximum penalties of two years' imprisonment, a fine of $10,000 or both. In cases of internal disciplinary action, again depending on the severity of the offences, officers may be counselled, fined, demoted or dismissed. In the period 1 July 1990 to 19 December 1995 there have been 21 criminal prosecutions and 48 disciplinary actions.

Appoint reporting system

896. To provide data for reporting to the Government about progress towards achieving its announced target of gender equality for appointments within federal government discretion to government boards, the Public Service Commission operates the computer-based software system Appoint. Portfolios use the system to provide the Commission with regular six monthly reports on appointments to bodies within their responsibilities.

897. Portfolios can record, retrieve and coordinate appointments information. However, all reports to the Public Service Commission are aggregate in nature and do not include data relating to individual appointees.

898. Appoint was designed for stand alone personal computers using Microsoft Disk Operating System. Beyond portfolios' internal reporting arrangements, the information is not networked, to protect the confidentiality of stored information. Aggregated information only is provided to the Public Service Commission by computer disk, not through network links. Portfolio users are responsible for establishing appropriate internal security mechanisms to protect individuals' personal information.

## The census

899. The confidentiality of information collected in the regular nationwide censuses that could be linked to individuals is guaranteed by the Census and Statistics Act 1905.

900. All Australian Bureau of Statistics (ABS) staff (including temporary employees) are legally bound under the Census and Statistics Act 1905 never to release personal information to any person or organization outside ABS. Anyone who breaks this pledge can be fined up to $5,000 and/or jailed for up to two years, even if no longer employed by ABS.

901. Completed census forms are transferred from the collection process to the census data processing centre under secure arrangements. Security personnel are employed to prevent any unauthorized access to the processing centre. Names and addresses of persons and households collected in the census are stored on computer files. Results from the census are disseminated in a manner which does not enable the identification of a person or household. To ensure this, the statistical tables released only contain broad classifications and are subject to slight random adjustment.

902. To assure the public about the preservation of confidentiality of data on individuals, census forms in Australia are destroyed once statistical data have been extracted, and the names and addresses of persons and households are not stored on computer files.

903. In Norfolk Island, census confidentiality is guaranteed by the provision of the Census and Statistics Ordinance 1961 which requires the Statistician and all others involved in collation of census results to adhere to a declaration of fidelity and secrecy. By Standing Order of the Statistician, all census forms and related material are destroyed once final figures are tabulated.

904. The decision not to retain information on identified persons and households was reached by the Norfolk Island government after arguments for and against their retention had been carefully weighed. A relevant factor was the very real fear that public confidence in the census and hence the willingness of individuals to provide full and accurate information about themselves could be undermined. A further consideration was the substantial costs which would be incurred in storing and accessing the records.

### State matters

905. The Federal Privacy Act 1988 also applies, with limited exceptions, to all Australian Capital Territory agencies. In the Australian Capital Territory, the Ombudsman Act 1989 also enables complaints against officials involving their actions to be comprehensively investigated.

906. In New South Wales, a Privacy Committee, established in 1975, conducts research into privacy issues, makes reports and recommendations to the government and non-government agencies, and investigates complaints from private individuals or their representatives. Although the Committee has some statutory powers to require people to provide it with information, it

endeavours to resolve all complaints by negotiation and conciliation. It has no power to enforce its recommendations. The Committee has issued numerous reports and guidelines to promote awareness of privacy issues.

907. The Privacy and Data Protection Bill 1994 was introduced into the New South Wales Parliament in April 1994 but the Bill lapsed with the change of government in New South Wales in early 1995. Since then, the Bill has been reintroduced as a private member's bill. The New South Wales government is also considering the possibility of introducing legislation.

908. In Queensland, the Privacy Committee Act 1984 established a Privacy Committee to investigate issues of privacy and provide advice to the Attorney-General on issues of privacy. The Privacy Committee Act 1984 expired on 14 June 1991. Queensland is currently considering implementation of the information privacy principles for public sector agencies.

909. In South Australia, a Privacy Committee was established in 1989. Among its other functions, the Committee is vested with responsibility for ensuring compliance with the information privacy principles based on those contained in the Federal Privacy Act 1988. The South Australian Adoption Act 1988 also has a number of provisions which provide for the privacy of the child. In addition, privacy is protected by the South Australian Freedom of Information Act 1991 in the same way as it is protected under the Commonwealth Freedom of Information Act 1982.

910. The Tasmanian Department of Community and Health Services has a strong privacy policy. The Adoption of Children Act 1988 and the Child Protection Act 1974 have strong confidentiality provisions. The health and education areas have a strong emphasis on a child's right to privacy.

911. In Victoria, under the Children and Young Persons Act 1989, it is an offence to reveal confidential information contained in a report to which a person has access without the consent of the person whom the report concerns.

912. Report No. 1 of the Western Australian Commission on Government identified more than 100 acts and regulations which restrict the use which government departments and other public bodies may make of information they acquire in the course of their duties. The Commission has made a number of recommendations relating to the secrecy of their duties. The Western Australian government is preparing a response to the Commission's recommendations.

913. The Children's Court of Western Australia Act 1988 prohibits the public release of any information about proceedings that is likely to identify a child. Adult courts are able to suppress the publication of identifying material when children appear before them or when the identification of adults would adversely affect children.

Defamation

914. The honour and reputation of a person are substantially protected by the civil and criminal actions for defamation. Certain exceptions apply to the protection offered by defamation laws. These include exceptions for

comments made during the course of parliamentary and judicial proceedings (see further discussion on parliamentary privilege in relation to article 19 below). Defamation laws do not recognize the right of action of a group.

915. The laws of defamation are complex and vary in detail between the jurisdictions. Attempts to achieve uniform national defamation laws have been unsuccessful to this time; however, at a meeting on 3 November 1994 of the Standing Committee of Attorneys-General, the ministers agreed to a national working group to examine and comment on a defamation bill to be produced by the New South Wales Law Reform Commission in 1995. The working group is to consider a number of issues that currently present obstacles to uniform national defamation laws.

916. The renewed impetus for uniformity is a result of the recent decisions of the High Court of Australia in Theophanous v. The Herald and Weekly Times Limited (1994) 124 ALR 1 and Stephens v. West Australian Newspapers Limited (1994) 124 ALR 80. Those decisions changed defamation law in its application to statements made in the course of discussion about political matters. A majority of the High Court decided that existing defamation laws infringe an implied constitutional freedom of communication on political matters. The majority said that the existing law, whether based on common law or statute, did not take sufficient account of freedom of communication in striking a balance between free speech and the protection of an individual's reputation.

Press

917. Privacy is also protected to some extent in Australia by voluntarily imposed media restraints. For example, The Statement of Principles of the Australian Press Council indicates support for due respect for private rights and sensitivities, and an obligation to ensure the truth and exactness of statements, and requires that news obtained by dishonest or unfair means or the publication of which would involve a breach of confidence should not be published.

918. Similarly, each journalist of the Media Entertainment and Arts Alliance adheres to a Journalists' Code of Ethics which requires him or her to "respect all confidences received in the course of his (or her) calling" and to "use only fair and honest methods to obtain news, pictures and documents". The Australian Press Council has established a procedure whereby persons may complain against a newspaper or periodical and seek a remedy against the publication concerned.

919. Currently, journalists are seeking an absolute or qualified right to be able to refuse to answer questions lawfully put to them in court proceedings or by other bodies with the power to require evidence to be given, in order to protect their sources. In this context, the rights and obligations of the media are being reviewed by the Senate Standing Committee on Legal and Constitutional Affairs.

Electronic media

920. The Broadcasting Services Act 1992 provides for industry codes of practice for programmes and complaint procedures in relation to electronic

media. Under the Broadcasting Services Act 1992, industry groups representing commercial and community television and radio broadcasting licensees are required to develop codes of practice relating to programming matters and complaints procedures. The codes may relate to, among other things, accuracy and fairness in news and current affairs, and vilification of minorities.

921. The codes of practice are then registered by the Australian Broadcasting Authority (ABA). To register a code of practice, ABA must be satisfied that the code provides appropriate community safeguards for the matters covered by the codes, are endorsed by a majority of the providers of broadcasting services in that section of the industry, and members of the public are given an adequate opportunity to comment on the codes. In developing codes, broadcasters must take into account relevant research conducted by ABA. ABA has the power to impose mandatory programme standards where it considers that codes of practice have failed or have not been developed.

922. Complaints regarding programme or advertising content or compliance with an industry code of practice may be made, in the first instance, to the service provider. If a person has complained to the service provider and is dissatisfied with the response, or has not received a response within 60 days, the complaint may be taken up with ABA. ABA must investigate all complaints which are correctly referred to it.

923. In an investigation, ABA has wide discretionary information gathering powers and may report a possible offence to the Director of Public Prosecutions. In relation to an adverse finding by ABA against the national broadcasters (the Australian Broadcasting Corporation and the Special Broadcasting Service), ABA may give to the Minister for Communications and the Arts a written report on the matter, which he or she is obliged to lay before Parliament.

## Other privacy protections

### Family and the home

924. As mentioned below in relation to article 23, neither Australian courts nor legislatures have been called upon to define the term "family". Accordingly, in Australia, there is no one rule of law that grants the family, as a distinct entity, freedom from arbitrary or unlawful interference. Rather, this protection is provided by a wide range of laws and practice. Some specific provisions are mentioned below. It is unlawful for anyone to remove a child from the custody of a parent except in the execution of a proper court order or other lawful authority (for example, under the child welfare legislation referred to under articles 9 and 24). To do so would amount to one of a number of criminal offences and would entitle the parent to seek an appropriate court order to have the custody of the child restored. Further, physical assaults perpetrated by family members on other family members would constitute a criminal offence which would provide lawful justification in taking action to protect those family members under threat of further violence. This issue is dealt with in more detail in the section on domestic violence under article 3.

## Sexual conduct

925. In relation to sexual conduct involving only consenting adults, the Human Rights (Sexual Conduct) Act 1994 was passed by the Federal Parliament on 9 December 1994 and came into force on 19 December 1994. The Act provides that sexual conduct involving only consenting adults acting in private is not to be subject, by or under any federal or state law, to any arbitrary interference with privacy.

926. The background to the legislation is a communication to the United Nations Human Rights Committee. In December 1991 the Committee was asked by a Tasmanian citizen, Mr Nick Toonen, to examine sections 122 (a) and (c) and 123 of the Criminal Code of Tasmania and to provide a view on whether they were consistent with articles 2.1, 17 and 26 of the Covenant. The provisions made anal intercourse, whether heterosexual or homosexual, and other "indecent practices" between men, a criminal offence. The provisions applied to acts in private as well as acts in public. The Committee formed the view that sections 122 (a) and (c) and 123 of the Tasmanian Criminal Code were an arbitrary interference with privacy and placed Australia in breach of article 17 of the Covenant. The Human Rights Commissioner also decided to undertake an independent examination of the relevant sections of the Tasmanian Criminal Code and to exercise his powers under the Human Rights and Equal Opportunity Commission Act 1986 to report formally to the Attorney-General. The report was subsequently tabled in Parliament on 23 August 1994. In examining the Tasmanian provisions, the Human Rights Commissioner concluded that they were inconsistent with article 17, article 2.1 and article 26. In response to the views of the Committee and the Commissioner, and in the absence of any agreement on the part of the Tasmanian Government to amend the provisions in question, the then Federal Government enacted the Human Rights (Sexual Conduct) Act 1994. The Act deals only with sexual conduct in private between consenting adults. The Act does not affect other laws which regulate sexual conduct in public, sexual conduct involving children and sexual conduct to which a person does not consent.

## Police interference

927. In relation to intrusion by members of the police force into the home, searches without warrant can occur in all Australian jurisdictions in three ways: by consent; under the common law as a search incidental to a valid arrest; or under specific statutory power.

928. At a federal level, the main statutory power relevant to both searches with and without warrant is found in the Crimes Act 1914 as amended by the Crimes (Search Warrants and Powers of Arrest) Act 1994. The Crimes Act 1914, as amended, effectively codified federal law in relation to search warrants, although some miscellaneous search powers exist in other legislation such as the Proceeds of Crime Act 1987 and the Financial Transaction Reports Act 1988.

929. In relation to searches without warrant, typically statutory powers require at least a reasonable suspicion that unlawfully obtained goods or weapons will be present on the person or on the property searched.

Increasingly parliaments have sought to limit statutory powers of search without warrant to situations where consent is obtained or where circumstances of urgency exist.

930. In relation to searches with warrant, the Crimes Act 1914 provides that a warrant to search premises can be issued if the issuing officer is satisfied that there are reasonable grounds for suspecting that there is, or will be, evidential material at the premises within the next 72 hours. The 72-hour time limit permits a warrant to be obtained in advance where it is anticipated that evidential material is to be taken to the premises. The Act also precludes the issue by lay justices of search or arrest warrants in relation to federal offences. Only magistrates and justices of the peace or other persons employed in a court who are authorized to issue search warrants, as the case may be, will be able to issue such warrants.

931. Under the Crimes Act 1914 the warrant must be executed within seven days and the intended scope of the warrant must be clear on its face. The warrant must state the offence to which it relates, a description of the premises, the kind of evidential material that is to be searched for, the name of the executing officer, the period for which the warrant remains in force and when the warrant may be executed.

932. Execution of a search warrant does not of itself authorize a search of persons or the arrest of any person found upon the premises unless the warrant allows an ordinary search or frisk search to be conducted of a person at or near the premises. If a person obstructs a constable when he or she is executing a search warrant, that person is committing an offence. The person may then be arrested without warrant, to prevent continuation of the offence of obstructing or hindering a police officer.

933. The High Court case of Coco v. The Queen (1994) 68 ALJR 401 imposes limits on the extent to which law enforcement officers can trespass with impunity on private property for the purpose of installing listening devices. On surveillance operations undertaken under the authority of the Telecommunications (Interception) Act 1979 see Monitoring of communications, below.

934. A number of criminal and civil remedies exist in regard to invasions of privacy in the home. The civil remedy of trespass serves to prevent a person entering upon another's property without lawful justification. The civil law remedy of nuisance gives further protection over enjoyment of land by curtailing the emission of noise, smoke and other nuisances from adjoining properties. Criminal offences such as offensive behaviour, breach of the peace or offences against environmental laws may also be relevant. In all states it is also unlawful to demand payment for unsolicited goods and services.

### Correspondence

935. By virtue of the criminal offences, including the offences of tampering with, stealing or wrongfully detaining the mail, under the Federal Crimes Act 1914, interference with the mail in Australia is a rare event.

Furthermore, the Australian Postal Corporation (Australia Post) is required under the Australian Postal Corporation Act 1989 to perform its functions in a way consistent with Australia's obligations under any convention.

936. The Australian Postal Corporation Act 1989 sets out the circumstances in which postal information may be disclosed, for law enforcement and national security purposes, by Australia Post employees.

937. Access to the actual contents of mail is not permitted under the Act except to enable Australia Post to fulfil its obligations to deliver mail and comply with federal or state warrants. Circumstances in which mail may be opened include:

To repair mail;

To obtain sufficient information to deliver the mail; or

To destroy dangerous articles to protect public safety.

938. Where mail has been opened or examined, a notice must be attached to the article indicating this and specifying the authority under which it has been done. The Australian Security Intelligence Organisation Act 1979 prohibits the disclosure by Australia Post employees of information concerning the cover or contents of a postal article, except in pursuance of a warrant issued for reasons of national security.

939. In addition, mail can be opened at the request of Customs officers if the officer reasonably believes that an article contains anything on which customs duties are payable, or which is a prohibited import or export under federal law.

940. Prisoners' correspondence may be subject to inspection in the interests of maintaining prison security. The correspondence of persons in mental institutions may also be inspected in accordance with legislative provisions and, in some jurisdictions, institutional rules.

## Monitoring of communications

941. The interception of telecommunications is prohibited under the Federal Telecommunications (Interception) Act 1979, unless permitted by warrant issued by a prescribed authority in the interests of national security or in connection with the investigation of specified serious offences. The serious offences specified include murder or kidnapping, or offences, punishable by at least seven years' imprisonment, involving loss of a person's life, serious personal injury, trafficking in narcotic drugs, serious fraud or serious loss to the revenue of the federal or a state government.

942. The agencies to which warrants are issued must report to the responsible minister on the assistance derived from each warrant. Moreover, a report is made annually to the Federal Parliament on the extent and effectiveness of warranted interceptions performed for law enforcement purposes. The Telecommunications (Interception) Act 1979 also makes provision for the inspection of records by the Ombudsman in cases involving

interceptions by the Australian Federal Police and the National Crime Authority, by the Inspector-General of Intelligence and Security in cases involving the Australian Security Intelligence Organisation, and by state Ombudsman bodies.

943. Most jurisdictions also have legislation regulating the use of listening devices. In general, the legislation prohibits the monitoring of private conversations by means of a listening device unless the person using the listening device is a party to the conversation or is authorized by a prescribed authority to use a listening device in connection with the investigation of serious offences.

944. The Federal Government is considering the need for more extensive privacy protection in the telecommunications sector. In December 1992, the national telecommunications regulatory authority, AUSTEL, released a report, "Telecommunications privacy". As part of the response to that report, AUSTEL, at the request of the Minister for Communications and the Arts, established a Privacy Advisory Committee to consider telecommunications privacy issues. That committee is currently examining a range of issues, including telemarketing and calling number display technology.

## Article 18

945. In Australia freedom of thought, conscience and religion, and its manifestations, are matters left largely to individuals. Little legislation exists to impose restrictions on the exercise of such freedoms nor is there any coercion to change or renounce any view or belief. Legislation which exists in regard to the matters addressed in this article is mainly concerned with religion and is outlined below.

946. The 1991 Australian census recognized over 70 religions adhered to by Australians. All of the major world faiths are represented in Australia, as are smaller religions such as the Society of Friends, the Baha'i faith and Caodaism. Approximately 77 per cent of Australians who took part in the census identified with a form of religious belief. Over half of the respondents identified themselves as either Anglican or Catholic.

### Freedom of religion

#### Federal matters

#### Constitutional guarantee

947. The Australian Constitution does not contain a specified head of legislative power to enable the Federal Government to legislate directly on the subject of religion or belief. Rather, section 116 of the Constitution provides:

> "The Commonwealth shall not make any law for establishing any religion, or for imposing any religious observance, or for prohibiting the free exercise of any religion, and no religious test shall be required as a qualification for any office or public trust under the Commonwealth."

948. Section 116 is directed only to the Federal Government and does not inhibit the power to legislate on matters of religion and belief in the states. State law in relation to religious freedom is outlined in the following section.

949. The scope of the freedom of religion guaranteed under the Constitution has been discussed in two major decisions of the High Court of Australia outlined below.

950. In Attorney-General for Victoria; ex rel Black v. Commonwealth (1981) 55 ALJR 155, the Attorney-General for Victoria argued that certain federal legislation, insofar as it resulted in financial benefits for schools conducted by or on behalf of religious bodies, infringed the "establishment clause" in section 116 of the Constitution. The High Court rejected this argument and interpreted section 116 as prohibiting the Federal Government from making any law "for conferring on a particular religion or religious body the position of a state (or national) religion or church". The particular laws under challenge were directed to the advancement of education and did not have the purpose or effect of setting up any religion or religious body as a state religion or a state church. One of the effects of this case is the recognition that the Federal Government may be involved with religious authorities, at least in pursuit of a "secular purpose".

951. In 1983, the High Court considered the concept of religion in the Church of the New Faith v. the Commissioner for Payroll Tax (1982-1983) 154 CLR 120. That case arose out of a claim by the Church of the New Faith that it was a religion and thus qualified for certain taxation exemptions under the law of the State of Victoria. Special leave to appeal to the High Court was sought in order to argue the question whether scientology was a religion. The Court decided it was a religion.

952. The High Court decided that the test of religion should not be confined to theistic religions. In three separate judgements members of the court identified characteristics or criteria by which a "religion" could be identified. In a joint judgement, Acting Chief Justice Mason and Justice Brennan stated:

> "Freedom of religion, the paradigm freedom of conscience, is of the essence of a free society. The chief function of the law in the definition of religion is to mark out an area within which a person subject to the law is free to believe and to act in accordance with his belief without legal restraint .... The absence of a definition which is universally satisfying points to a ... fundamental difficulty affecting the adoption of a definition for legal purposes. A definition cannot be adopted merely because it would satisfy the majority of the community or because it corresponds with a concept currently accepted by that majority. The development of the law towards complete religious liberty and religious equality ... would be subverted and the guarantees in s116 of the Constitution would lose their character as a bastion of freedom if religion were so defined as to exclude from its ambit religions out of the main streams of religious thought. Though religious freedom and religious equality are beneficial to all true religions, minority religions - not well

> established and accepted - stand in need of special protection ... It is more accurate to say the protection is required for the adherents of religions, not for the religions themselves ... it would be contradictory of the law to protect at once the tenets of different religions which are incompatible ... Protection is accorded to preserve the dignity and freedom of each man so that he may adhere to any religion of his choosing or to none. The freedom of religion being equally conferred on all, the variety of religious beliefs which are within the area of legal immunity is not restricted. ... There can be no acceptable discrimination between institutions which take their character from religions which the majority of the community recognizes as religious and institutions that take their character from religions which lack that general recognition." (pp. 130-132).

953. Discrimination on the ground of religion in employment in the federal civil service is dealt with in the Federal Public Service Act 1922. That Act was amended by the Public Service Reform Act 1984, inter alia, to require that the powers in respect of appointments, transfers and promotions in the public service be exercised in accordance with procedures that preclude discrimination on various grounds, including religion.

### Human Rights and Equal Opportunity Commission

954. The Human Rights and Equal Opportunity Commission Act 1986 establishes the Human Rights and Equal Opportunity Commission (HREOC). The Act enables the Human Rights Commissioner to conciliate complaints of discrimination on the ground of religion in the areas of employment or occupation. HREOC is empowered to conciliate on a breach by the Federal Government of freedom of religious opinion as provided for in articles 2 (1) and 18 of this Covenant.

955. From February 1993, the Human Rights and Equal Opportunity Commission Act 1986 was extended to empower HREOC to inquire into acts or practices of the Federal Government which are inconsistent with the rights contained in the Declaration on the Elimination of All Forms of Intolerance and of Discrimination Based on Religion or Belief (the United Nations Declaration).

956. HREOC may also examine federal legislation to determine whether it is consistent with the rights in the United Nations Declaration or this Covenant and report to the Federal Attorney-General on action that should be taken by the Federal Government on matters relating to human rights. In addition, HREOC has power to conduct research and educational programmes and to promote understanding and acceptance of these rights.

### State matters

957. The Australian Capital Territory Discrimination Act 1991 provides that it is unlawful for a person to discriminate on the ground of religious conviction. The Act provides that an employer may not refuse permission for employees to carry out a religious practice during working hours, if the practice is one which is recognized as necessary or desirable by persons of that religious conviction, which may reasonably be performed during working hours and which does not subject the employer to any unreasonable detriment. The Act also makes it unlawful to discriminate on the ground of religious

conviction in a number of areas, including access to professional or trade organizations, education (subject to some exceptions) and the provision of goods, services, facilities and accommodation.

958. In New South Wales the Anti-Discrimination Act 1977 does not provide for a ground of unlawful discrimination on the basis of religion or religious belief. This reflects the New South Wales Government's broader policy that anti-discrimination law should not interfere with the basic right of religious organizations to propagate religion in accordance with their religious doctrines.

959. The New South Wales Law Reform Commission examined the possible coverage of religious discrimination in the course of its current reference concerning the Anti-Discrimination Act 1977. A discussion paper, with draft recommendations, was released in late 1995.

960. The Northern Territory Anti-Discrimination Act 1992 provides that a person shall not discriminate against another person on the ground of his or her religious belief or activity.

961. The Queensland Anti-Discrimination Act 1991 prohibits discrimination on the basis of religion. In addition, under the Queensland Criminal Code it is an offence to disturb any gathering for religious worship or obstruct or assault any minister of religion while performing the duties of his or her office.

962. The South Australian Summary Offences Act 1953 also makes it unlawful to interrupt or disturb religious worship or to interrupt or disturb persons officiating at any religious meeting.

963. In Tasmania, the Constitution Act 1934 provides for the following guarantee of freedom of conscience and religion:

> "Freedom of conscience and free profession and practice of religion are, subject to public order and morality, guaranteed to every citizen.
>
> "No person shall be subject to any disability, or be required to take any oath on account of his religion or religious belief and no religious test shall be imposed in respect of the appointment to or holding of any public office."

964. The Victorian Equal Opportunity Act 1995 prohibits direct and indirect discrimination on the grounds of religious belief or activity, except for discrimination by religious bodies or religious schools if it is necessary to avoid injury to religious sensitivities, or is in accordance with relevant religious beliefs or principles, or discrimination if it is necessary to comply with a person's genuine religious beliefs or principles.

965. The Western Australian Equal Opportunity Act 1984 makes it unlawful to discriminate on the ground of religious conviction or because of an absence of religious conviction in various circumstances.

Freedom to manifest religion

966. In Australia, the freedom to manifest one's religion or belief is subject to restrictions applying generally under the ordinary laws of Australia. In Church of the New Faith v. The Commissioner for Payroll Tax (1982-1983) 154 CLR 120, referred to above, Acting Chief Justice Mason and Justice Brennan put the principle in the following way:

> "The area of legal immunity marked out by the concept of religion cannot extend to all conduct in which a person may engage in giving effect to his faith in the supernatural. The freedom to act in accordance with one's religious beliefs is not as inviolate as the freedom to believe, for general laws to preserve and protect society are not defeated by a plea of religious obligation to breach them ... Conduct in which a person engages in giving effect to his faith in the supernatural is religious, but it is excluded from the area of legal immunity marked out by the concept of religion if it offends against the ordinary laws, i.e. if it offends against laws which do not discriminate against religion generally or against particular religions or against conduct of a kind which is characteristic only of a religion." (pp. 135-136)

967. For example, in Adelaide Company of Jehovah's Witnesses Inc. v. Commonwealth (1943) 67 CLR 116 the High Court took the view that section 116 of the Constitution did not prevent the Government from making laws prohibiting the advocacy of doctrines or principles which, though advocated in pursuance of religious convictions, are prejudicial to the prosecution of a war in which Australia is engaged. The case arose from a declaration by the Federal Government during the Second World War that a number of organizations, including the Adelaide Jehovah's Witnesses, were prescribed organizations prejudicial to the defence of Australia. Federal government agents occupied the Adelaide premises of the church, confiscating records and excluding church members from the building.

968. However, no laws exist specifically to prevent the exercise of an individual's right to freedom of religion. From time to time concerns have been expressed that the activities of certain religious sects may infringe the rights and freedoms of other members of the community. The Federal Government has taken the attitude that it is not appropriate to legislate to restrict the activities of religious sects. However, to the extent that such activities would breach existing laws, in particular, criminal laws, then such matters should be dealt with as breaches of the law are normally dealt with, namely, by the courts.

969. The practice of religious belief is in fact facilitated by a number of statutory enactments. The income of a religious institution is exempt from the payment of income tax. Several jurisdictions have a special statutory offence of disturbing persons lawfully assembled for religious worship. In some jurisdictions, privilege is conferred on a confession made by a person to a member of the clergy. Provision is also made for members of the clergy to officiate at weddings and for the funding of church schools. The Defence Act 1903 provides some exemptions from military service in the event of Australia being attacked or invaded by an enemy or armed force. The Act

exempts persons from service whose conscientious beliefs (which may include religious beliefs) do not allow them to participate in war or warlike operations. In addition, the Act provides the exemption in relation to people whose conscientious beliefs do not allow them to participate in a particular war or warlike operations.

970. Prisons provide for religious services to be carried out and for prisoners to have regular contact with a member of the clergy if required. In Victoria, under the Corrections Act 1986 every prisoner has the right to be provided with special dietary food where the Governor is satisfied that such food is necessary for medical reasons or on account of the prisoner's religious beliefs or if the prisoner is a vegetarian. A prisoner is also entitled to practise a religion of his or her choice and, if consistent with prison security and management, to join with other prisoners in practising that religion and to possess such articles as are necessary for that purpose.

971. There are numerous other provisions concerning religious beliefs and practices. These include exemption from jury service for ministers of religion and members of religious orders, provision for conscientious objection (including on religious grounds) to trade union membership, the exemption from the Federal Human Rights and Equal Opportunity Commission Act 1986 and the Sex Discrimination Act 1984 of certain religious acts or practices, measures to protect Aboriginal and Torres Strait Islander sacred sites, the recognition of religious obligations in special meat slaughtering rites, special arrangements to allow postal or pre-poll voting where religious beliefs or membership of a religious order prevent attendance at a polling booth, sales tax exemptions on religious goods and other tax exemptions for religious bodies and the alternative use of an affirmation, if preferred, to swearing an oath on the Bible when giving evidence in court and in other proceedings.

## Religious education

972. Education in Australia is provided across all jurisdictions by both government and non-government schools. All schools are required to comply with certain educational standards which are laid down by the Department of Education in the particular jurisdiction. A high percentage of non-government schools are run by churches or religious communities. These schools are recognized as playing an important role in the education of children in Australia. Information concerning the education system in Australia is provided in Section G, and detailed information on religious education in schools is provided in paragraphs 346 to 351 of Australia's first report under the Convention on the Rights of the Child.

## Limitations

973. Some minor limitations do exist on the freedom of persons to exercise their beliefs fully. Most jurisdictions have legislation to provide that if a parent refuses (usually on religious grounds) to give consent to a child receiving a blood transfusion and two or more legally qualified medical practitioners believe that a blood transfusion is necessary to save the child's life, a legally qualified medical practitioner who performs the

transfusion upon the child will be deemed for all purposes to have performed the transfusion with the authority of the person legally entitled to authorize the transfusion.

974. Although prisons provide for religious services to be conducted and for prisoners to have regular contact with a member of the clergy if required, the nature of the institution may not allow certain prisoners to practise all aspects of their religion (for example, as to dress and diet).

## Article 19

975. In Australia, everyone has the right to hold opinions without interference. While, generally, everyone in Australia also has the right to freedom of expression, the effective use of freedom of expression is constrained to some extent by the laws and practices outlined below.

976. The extent to which laws and practices might restrict freedom of expression is a matter which itself is subject to monitoring. The Human Rights and Equal Opportunity Commission can receive complaints of violations of article 19 of the Covenant in areas of federal responsibility. In the Australian Capital Territory, Queensland, the Northern Territory, Victoria and Western Australia, legislation exists to enable the bringing of complaints of discrimination on the ground of lawful religious or political belief or view or engaging in any lawful religious or political activities.

977. In relation to restrictions on expression, the following discussion deals with the ownership of, and political content in, broadcasting, civil servants' and journalists' use of information held by governments, Australian censorship laws, contempt of court and the encouragement to expression provided by parliamentary privilege. Control on the publication of court hearings is referred to above in comments in relation to article 14. The major restriction on the right of freedom of expression which is constituted by the law of defamation is discussed above in comments in relation to article 17. Freedom of expression may also be affected by the laws of various Australian jurisdictions regulating public assemblies and behaviour in public places. This topic is discussed below in comments on article 21.

### Broadcasting

#### Ownership

978. Regulation of broadcasting in radio and television in Australia is a federal government responsibility which in practice is co-ordinated by two acts: the Broadcasting Services Act 1992 and the Radiocommunications Act 1992. Generally, the Broadcasting Services Act 1992 governs the types of services that require a licence and the Radiocommunications Act 1992 governs the licensing of transmitter technology. The following discussion deals solely with the provisions of the more relevant of these Acts, the Broadcasting Services Act 1992.

979. The Federal Parliament intends that different levels of regulatory control be applied across the range of broadcasting services according to the degree of influence that different types of broadcasting services are able to

exert in shaping community views in Australia. Categories with little or no public interest concern, such as those with narrow appeal, are authorized under the standing authority of "class licences", and require no individual licensing, apart from appropriate technical licensing. Those services with a higher level of public interest concern, or services of wide appeal, are licensed individually. The regulatory authority established under the Act is the Australian Broadcasting Authority (ABA).

980. The Broadcasting Services Act 1992 provides for six types of broadcasting services. They are listed below.

> National broadcasting services. These encompass television and radio services provided by the Australian Broadcasting Corporation and the Special Broadcasting Service and are mostly budget funded. National broadcasting services are available free to the public. No licence is required for these services under the Act.
>
> Commercial broadcasting services. These encompass all general interest television and radio services that are provided for profit resulting from the carriage of advertisements. They are available free to the public but are required to be licensed under the Act.
>
> Community broadcasting services. These are provided free to the public for community purposes, but must not be provided as part of a profit-making enterprise. They must be licensed under the Act.
>
> Subscription broadcasting services. These services are programmes of wide appeal provided to viewers for a subscription or programme-based fees. A licence is required for operation under the Act.
>
> Subscription narrowcasting services. These services are directed at special interest groups and/or are provided in limited locations and/or for a limited period or to cover a special event. Narrowcasting services do not require a licence to operate under the Act.
>
> Open narrowcasting services. These are similar to subscription narrowcasting services, except that they are provided free of direct charges to those with appropriate reception equipment. Again no licence is required.

981. Licence renewal is required at least once every five years. In most circumstances renewal is automatic. Licensees and applicants for licences will only be deemed unsuitable where ABA considers that there is a significant risk of their committing an offence against the Broadcasting Services Act 1992 or breaching licence conditions.

982. ABA administers the grant of broadcasting service bands to applicants. The Minister has reserved some of the broadcasting services bands for the national broadcasting services (see above) and for free grant to community broadcasting services (see above) under a comparative merit selection process. All other channel capacity is to be allocated by ABA through a price-based allocation process and, in single service markets, through an administrative allocation process. Initially, the allocation processes are restricted to aspirant commercial broadcasters and then to other types of broadcasters.

983. The Broadcasting Services Act 1992 places clear control limits on commercial broadcasting service licences to encourage diversity in, and to ensure that Australians have effective control of, the more influential broadcasting services.

984. In relation to commercial television, ABA must be satisfied in the following three regards prior to issuing a licence.

A person must not control licences whose combined licence area populations exceed 75 per cent of the population of Australia.

A person may only control one commercial television broadcasting licence in the same licence area except in special circumstances and with prior approval from ABA.

Foreign control of commercial television broadcasting licences is prohibited, no foreign person may have "company interests" in a licence exceeding 15 per cent, and aggregated foreign ownership in a licence must not exceed 20 per cent.

985. As regards commercial radio, a person cannot control more than two commercial radio broadcasting licences in the same licence area.

986. Moreover, a person is not permitted to control:

A commercial television broadcasting licence and a commercial radio broadcasting licence that have the same licence area;

A commercial television broadcasting licence and a newspaper that is associated with the licence area; or

A commercial radio broadcasting licence and a newspaper that is associated with the licence area.

987. Lesser limits are placed on commercial radio than on commercial television because the larger number of radio services being provided reduces the influence of individual services.

988. Finally, ABA regulates directorships of media-related companies.

A person is prohibited from being a director of a company that controls, or of companies that between them control, a prohibited combination of media outlets.

A person who controls one or more commercial broadcasting licences or newspapers is prohibited from being a director of a company with media holdings, if, between them, the person and the company control a prohibited combination of media outlets.

Not more than 20 per cent of the directors of a commercial television broadcasting licensee may be foreign persons.

989. In order to provide certainty for licensees and their owners, ABA is empowered to give opinions as to whether a certain arrangement constitutes control or not. Reporting requirements are reduced to the minimum required for effective monitoring of the control regime.

Content

990. As discussed in the commentary on article 17, the Broadcasting Services Act 1992 and the Australian Broadcasting Authority under the Act are also concerned with the content of broadcast programmes. There are defined standards for Australian content on commercial television and children's television standards on commercial and community television broadcasting services. A flexible regime exists that allows codes of practice and programme standards to develop and evolve in response to changing community attitudes. ABA has reserve powers to set standards or impose licence conditions requiring compliance with codes of practice if the latter fail.

991. The Broadcasting Services Act 1992 also imposes some requirements in relation to the broadcasting of political matter. The main features are:

> That political matter must be clearly attributed to its authors;
>
> The imposition of bans preventing the televising of election matter for a short period before the date of elections; and
>
> That if, during an election period, a broadcaster broadcasts election matter, the broadcaster must give reasonable opportunities to broadcast election matter to all political parties contesting the election, being parties that were represented in either House of the Parliament for which the election is to be held at the time of its last meeting before the election period.

992. These restrictions are less stringent than conditions imposed under the predecessor Act to the Broadcasting Services Act 1992. The earlier Act prohibited, with narrow exemptions, the broadcasting of political advertisements at all times. The ban applied in respect of all levels of every government and in respect of the national broadcasters (the Australian Broadcasting Commission and the Special Broadcasting Service) and licensed broadcasters.

993. The Act moreover provided for the banning of advertisements by federal government departments and authorities during the immediate run up to a federal election or referendum, and by departments and authorities of the Northern Territory and the Australian Capital Territory during the run-up to elections in those jurisdictions.

994. The then Human Rights Commissioner expressed to the Federal Government his formal opposition to the legislation on the grounds that it was inconsistent with articles 19 and 25 of the Covenant. The constitutionality of the ban on political advertising was tested in 1992 in Australian Capital Television Pty. Ltd. v. Commonwealth ((1992) 108 ALR 577) (the Political Advertising case). The High Court was asked to decide whether there was an implied constitutional freedom of communication which invalidated the

sections of legislation containing the above ban. In their decision, six of the seven judges held that the provision by the Constitution of a system of representative democracy necessarily implied a freedom of communication. This freedom was variously described by the judges as: "freedom of communication, at least in relation to public and political discussion" (Mason CJ); "that freedom of discussion of political and economic matters which is essential to sustain the system of representative government" (Brennan J); "freedom ... of communication about matters relating to the Government of the Commonwealth" (Deane and Toohey JJ); "freedom of political discourse" (Gaudron J); and "freedom of participation, association and communication in respect of the election of the representatives of the people" (McHugh J).

995. The essence of the High Court's reasoning was that there is implicit in the Constitution a guarantee of freedom of communication in relation to political matters. This freedom is said to be essential to the proper functioning of our system of democratic, representative government. The freedom is not absolute, but the restrictions imposed under the predecessor Act were said (with one dissent) to go further than was reasonably necessary.

996. A second case in 1992 also dealt with the implied constitutional right to communication. The case arose from an article published in The Australian newspaper in which the Australian Industrial Relations Commission was described as "corrupt" and "compliant". It was argued that such description violated section 229 (1) (d) (ii) of the Industrial Relations Act 1988, which provided that a person shall not use words calculated to bring the Industrial Relations Commission into disrepute. In Nationwide News v. Wills ((1992) 108 ALR 681) (the Nationwide News case), the full bench of the High Court held that the law violated the implied constitutional freedom of public discussion of political and economic matters/communication of information and opinions regarding matters relating to the Government.

997. A number of judges recognized that certain restrictions on communication would be appropriate in "an ordered society" to address competing public interests. Chief Justice Mason suggested in the Political Broadcasting case that a distinction should be made between restrictions which target ideas or information and those which restrict an activity or mode of communication. In his assessment, the latter type was more susceptible of justification. Material considerations in determining whether a restriction is permitted include:

> Whether the restriction is proportionate to the competing public interest to be served (Political Broadcasting case per Mason CJ); and
>
> Whether it is practicable to protect that competing interest "by a less severe curtailment of the freedom" (Nationwide News case).

Censorship

998. The Federal Government's censorship powers derive from section 51 of the Australian Constitution, the power to regulate overseas and interstate trade, and section 122, the power to make laws with respect to the Territories.

999. These censorship powers are defined in the Customs (Prohibited Imports) Regulations and the Customs (Cinematograph Films) Regulations (the Regulations); the latter authorize the establishment of the Film Censorship Board (the Board) and the appeal body, the Film and Literature Board of Review (the Review Board).

1000. Imported films for public exhibition are examined in terms of the Regulations to determine whether they should be registered. Once registered, they are classified by the Censorship Board in accordance with state laws, under arrangements which have been in force with the Federal Government since 1949.

1001. Federal and state governments have agreed to a coordinated approach for the classification of home videotapes, publications and computer games, endorsing the Australian Capital Territory Classification of Publications Ordinance 1983 (the Ordinance) as a legislative model.

1002. The 1949 federal and state government agreements (and succeeding agreements) and the arrangements set out in the preceding paragraph combine to provide a legal framework for the classification of films, videotapes, publications and computer games.

1003. Notwithstanding the agreements and arrangements, some states retain some powers. Relevant ministers in Western Australia and South Australia may vary decisions of the Censorship Board and the Review Board in relation to cinema films in their respective states. In Western Australia this power extends to videotapes. Western Australia maintains a separate regime for the classification of publications. South Australia and Tasmania maintain classification of publications boards which may vary decisions of the Censorship Board in relation to home videotapes; the South Australian and Western Australian boards may also vary decisions of literature classification officers (see below). The Tasmanian board operates that state's literature classification scheme.

### Videos and films

1004. In Australia, classification of cinema films, home videotapes and computer games is compulsory. Decisions of the Censorship Board in these areas are taken by majority vote and against criteria set out in relevant legislation and in formally gazetted classification guidelines which are periodically updated to meet changing community standards. The Board's decision-making also gives effect to the fundamental principles of the National Classification Code:

> Adults should be able to read, see and hear what they want;
>
> Minors should be protected from material likely to harm or disturb them;
>
> Everyone should be protected from exposure to unsolicited material they find offensive; and

The need to take account of community concerns about:

Depictions that condone or incite violence, particularly sexual violence; and

The portrayal of persons in a demeaning manner.

1005. The Board is empowered to:

Refuse to register a film imported for public exhibition if, in the Board's opinion, it is "blasphemous, indecent or obscene"; "likely to be injurious to morality"; or "undesirable in the public interest".

Classify a film as:

| | |
|---|---|
| G | Suitable for all ages; |
| PG | Parental guidance recommended for persons under 15 years; |
| M15+ | Recommended for mature audiences 15 and over; |
| MA15+ | Restrictions apply to persons under 15; |
| R18+ | Restricted to adults 18 years and over; or |
| Refuse | Refused classification. |

Classify commercial videotapes as:

| | |
|---|---|
| G | Suitable for all ages; |
| PG | Parental guidance recommended for persons under 15 years; |
| M15+ | Recommended for mature audiences 15 and over; |
| MA15+ | Restrictions apply to persons under 15 years; |
| R18+ | Restricted to adults 18 years and over; |
| X | Restricted to those 18 years of age and over, and may include explicit depictions of non-violent sexual acts involving consenting adults (videos in Australian Capital Territory and Northern Territory only); or |
| Refuse | Refused classification. |

Classify computer games as:

| | |
|---|---|
| G | Suitable for all ages; |
| G8 | Suitable for people over 8 years; |
| M | Recommended for mature audiences 15 and over; |
| MA | Restrictions apply to persons under 25; or |
| Refuse | Refused classification. |

Approve or refuse to approve a range of advertising material related to the above.

1006. Literature classification officers attached to the Office of Film and Literature Classification classify publications for all states except Western Australia and Tasmania as:

Unrestricted;

Restricted - Category 1;

Restricted - Category 2; or

Refused classification.

1007. When the Act comes into force this function will be assumed by the Classification Board (successor to the Censorship Board).

Enforcement

1008. The Censorship Board's consumer advice about the content of non-G films and videotapes must, by law, be displayed with classification markings on the relevant cassettes and on related film and video advertising.

1009. Enforcement of this requirement, and other related measures, is the responsibility of the State authorities.

Literature

1010. Literature classification in Australia is at present voluntary. Under the Federal Classification (Publications, Films and Computer Games) Act which will come into operation on 1 January 1996, certain literature, for example adult magazines, will require mandatory classification. As a precursor to that legislation and in response to community concern, in June 1992, new guidelines for the classification of publications were endorsed by ministers. The new guidelines impose tighter controls over what constitutes acceptable material for covers of magazines.

1011. Employees of the Office of Film and Literature Classification within the Attorney-General's Department are appointed as literature classification officers. They classify printed matter on behalf of the governments of the

Australian Capital Territory, the Northern Territory, Queensland, New South Wales, Victoria and South Australia. As mentioned above, Western Australia and Tasmania operate their own schemes.

### Superhighway

1012. The growth of the information superhighway will involve the dissemination of information and the growth of interactive communication internationally on a scale and at a rate that is unprecedented. The speed, volume and complexity of electronic communications and information dissemination and the capacity of new technologies to disregard national boundaries pose challenges to existing legal rules and systems.

1013. In 1994, a joint task force from the federal Attorney-General's Department and the Department of Communications and the Arts examined issues arising from the need for a legal framework for the information superhighway. The task force's "Report on the regulation of computer bulletin board systems" was released in October 1994. The task force favoured a scheme involving the development and adoption of an industry code of practice (which would include the application of guidelines in dealing with varying types of content) backed up by criminal sanctions to ensure compliance with the scheme.

1014. In the context of the task force's report and at the direction of federal and state censorship ministers, in the second half of 1995, consultations were under way with industry participants and with many of the users of the new technology in the community. In particular, the Minister for Communications and the Arts has directed the Australian Broadcasting Authority (ABA) to investigate the nature and content of emerging online services and to develop strategies and measures for online service providers to meet community concerns. ABA had not completed its investigation during the period covered by this report.

1015. Currently, section 85ZE of the Crimes Act 1914 penalizes the dissemination of offensive material on a telecommunications service. Section 85ZE states:

> "A person shall not knowingly or recklessly use a telecommunications service supplied by a carrier to menace or harass another person; or use a telecommunications service supplied by a carrier in such a way as would be regarded by reasonable persons as being, in all the circumstances, offensive.
>
> Penalty: Imprisonment for one year."

## Government information

### Civil servants

1016. All Australian jurisdictions require their civil servants to keep confidential information relating to their work, duties and responsibilities. The Federal Government and some state governments also impose restrictions on public comment by civil servants.

1017. At a federal level, section 70 of the Crimes Act 1914 coupled with regulation 35 of the Public Service Act 1922 effectively prohibit the disclosure of all information by a federal public servant other than in the course of the officer's official duty.

1018. In New South Wales, the Public Sector Code of Conduct recognizes that public servants, as members of the community, have the right to make public comment and to enter into public debate on political and social issues. However, the Code also sets out the following circumstances where public comment by public sector employees is inappropriate:

> Where there is an implication that public comment, although made in a private capacity, is in some way an official comment of the government or of the public servant's organization; or
>
> Where public comment, regardless of the connection or lack of connection with a public servant's normal duties, amounts to criticism sufficiently strong or persistent to give rise to the public perception that the officer is not prepared to implement or administer the policies of the government of the day as they relate to his or her duties.

1019. The Code specifies that a public servant should only disclose other official information or documents acquired in the course of his or her employment when required to do so by law, in the course of duty, when called to give evidence in court, or when proper authority has been given.

1020. The Code amounts to a statement of the terms and conditions of New South Wales public sector employment. Accordingly, its breach can result in a breach of discipline for the purposes of the Public Sector Management Act. A breach of discipline for the purposes of the Public Sector Management Act may result in various sanctions being applied, ranging from counselling and suspension from duty to the laying of criminal charges or civil action.

1021. The restrictions upon public comment by New South Wales government employees contained in the Code do not amount to a general restriction on the right of freedom of speech, but provide specific situations in which the general right of free speech is limited in accordance with the terms and conditions of public sector employment. These circumstances are confined to unauthorized public statements which have the potential to compromise the integrity and reputation of the government.

1022. Jurisdictions that have whistleblowing legislation (legislation which protects disclosure of information in the public interest in certain circumstances) are:

> South Australia (Whistleblowers Protection Act 1993);
>
> Australian Capital Territory (Public Interest Disclosures Act 1994);
>
> Queensland (Whistleblowers Protection Act 1994); and
>
> New South Wales (Protected Disclosures Act 1994).

1023. At a federal level, the introduction of the Freedom of Information Act 1982, along with the other administrative laws, indicated a change of attitude by the Federal Government (and bureaucracy) to the disclosure of official information. The Gibbs Committee (which reviewed federal criminal laws) on the disclosure of official information, the Senate Select Committee on Public Interest Whistleblowing and the Report of the Commission of Inquiry into the Australian Secret Intelligence Service have all made proposals for the protection of whistleblowers.

1024. Regarding the disclosure of official information, the Gibbs Committee found in its report that:

> "The catch-all provisions of the existing law are wrong in principle and additionally ... they are seriously defective from the point of view of effective law enforcement."

1025. The Committee recommended that the blanket prohibition on disclosure represented by Public Service Regulation 35 should be replaced by protection for specific categories of information (such as certain information relating to the intelligence and security services, defence, foreign relations and law enforcement). As part of its reforms the Gibbs Committee also recommended a scheme for the protection of whistleblowers and the investigation of their allegations.

1026. The Senate Select Committee on Public Interest Whistleblowing was formed on 2 September 1993 and tabled its report, "In the public interest", on 30 August 1994. Protection for whistleblowers was also canvassed by the Commission of Inquiry into the Australian Security Intelligence Organisation (the Samuels Inquiry).

1027. Information in the possession of the Federal Government can be requested by members of the public under the provisions of the Freedom of Information Act 1982. The Act provides for access and for rights of correction to a wide range of information, including information about the operations of federal departments and public authorities and documentary information held by those bodies. Access is subject to exceptions, for example, to protect essential public interests or to protect the privacy and business affairs of the person who is the subject of the information held.

1028. Similar freedom of information legislation also exists in all states, with the exception of the Northern Territory.

### Journalists

1029. In Australia a non-statutory mechanism for voluntary self-restraint by the media in relation to the publication of sensitive defence, security and intelligence information, known as the D Notice system, was established in 1952. The system was based on a similar British system first developed in 1912. The foundation of the system was an acceptance by media organizations - at editorial as well as management level - that there is a public interest in the non-disclosure of certain categories of information. The D Notices defined the categories of information to be protected.

1030. Under the system a committee comprised of media and government representatives could issue D Notices to the media offering advice and guidance on particular topics and requesting that certain information not be published. The media could also approach the committee to seek guidance on other topics not covered by an existing D Notice before publishing information that could have national security implications. Breaches of the D Notices were not as such subject to criminal sanctions, but section 79 of the Crimes Act 1914 prohibits the disclosure of certain information in circumstances which could also be covered by a D Notice.

1031. Early in 1994 a judicial inquiry (the Samuels Commission) was set up to investigate certain allegations by former members of the Australian Secret Intelligence Service (ASIS). The D Notice system was examined in the course of that inquiry, amidst press comment that the existing system had fallen into disuse. Four D Notices were current at that time, one of which related to the employees or activities of ASIS. The Commission reported in March 1995 and recommended the reinvigoration of the D Notice system. The then Federal Government accepted this recommendation.

1032. The Commission also recommended that provisions prohibiting the primary and secondary disclosure of official information be reformed, but that in relation to secondary disclosure the change be delayed to give the D Notice system a chance to operate. The Federal Government's response, as outlined to the Senate on 1 June 1995, was that laws prohibiting the unauthorized primary and secondary disclosure of certain narrowly defined categories of information should be enacted at the same time as the D notice was revitalized. The D Notice system would continue to be voluntary, while the existing law on the disclosure of official information would be clarified.

1033. Discussions have been initiated with the media on a revitalized D Notice system and the reform of the secondary disclosure provisions.

### Australian Security Intelligence Organization

1034. The Australian Security Intelligence Organization Act 1979 specifies the functions that the Australian Security Intelligence Organization performs with reference to the defined concept of "security", which includes the protection of Australians from, among other things, espionage, sabotage, politically motivated violence and acts of foreign interference. In addition, the right to engage in lawful advocacy, protest or dissent is protected by section 17A of the Australian Security Intelligence Organization 1979 Act, which states that:

> "The Act shall not limit the right of persons to engage in lawful advocacy, protest or dissent and the exercise of that right shall not, by itself, be regarded as prejudicial to security, and the functions of the Organization shall be construed accordingly."

### Parliamentary privilege

1035. The houses of the several Australian parliaments, their committees and their members are recognized as possessing certain legal powers, privileges and immunities which are generally described as parliamentary privileges. In general, the privileges are derived from specific legislative grants, such as section 49 of the Australian Constitution which provides:

> "The powers, privileges, and immunities of the Senate and of the House of Representatives, and of the members and the committees of each House, shall be such as are declared by the Parliament, and until declared shall be those of the Commons House of Parliament of the United Kingdom, and of its members and committees, at the establishment of the Commonwealth."

1036. In the United Kingdom, parliamentary privilege derives from article 9 of the Bill of Rights 1689 which provides:

> "That the freedom of speech, and debates or proceedings in Parliament, ought not to be impeached or questioned in any court or place out of Parliament."

1037. The Federal Parliament has declared certain aspects of the Parliament's powers, privileges and immunities in the Parliamentary Privileges Act 1987. However, that Act declares that it is not intended to displace the powers, privileges and immunities of each House, and of the members and committees of each House, as in force before the commencement of the Act, except to the extent that the Act expressly provides otherwise. The Act provides, in part, that words or acts are not taken to be an offence against a House by reason only that they are defamatory or critical of the Parliament, a House, a committee or a member.

1038. In addition, the Parliamentary Papers Act 1908 provides for the publication of parliamentary papers and protects the printer and publisher of those papers from any liability arising out of the publication. Further, the Parliamentary Proceedings Broadcasting Act 1946 authorizes the broadcasting of parliamentary proceedings and gives immunity from civil or criminal liability for the broadcasting of any part of those proceedings.

1039. Australian courts have taken the view that the colonial (now state) legislatures did not inherit wholesale the privileges of the House of Commons, but only those which were reasonably necessary to their existence and proper exercise of their functions and duties. This relatively restricted view has prompted most Australian parliaments to legislate with respect to parliamentary privilege.

1040. Some of the states have conferred on their parliament, committees and members the privileges, immunities and powers held by the House of Commons of Great Britain (Constitution Act 1975 (Victoria), Constitution Act 1934 (South Australia), Constitution Act 1867 (Queensland), parliamentary Privileges Act 1891 (Western Australia). Members of the Queensland and Tasmanian parliaments are protected against criminal and civil liability for anything said or published by them during proceedings in parliament. The New South Wales parliament still depends for most of its privileges upon the principle of necessity, however there have been some specific grants of powers and privileges. For example, absolute privilege against liability for defamation is extended to witnesses attending before either house or a committee (Parliamentary Evidence Act 1901 (New South Wales)).

1041. The powers, privileges and immunities of members of the Northern Territory's Legislative Assembly are set out in the Legislative Assembly (Powers and Privileges) Act 1992. The Act provides that the powers (other than legislative powers), privileges and immunities of the assembly and its members are the same as those of the Federal House of Representatives. The Act provides that there shall be freedom of speech, debates and proceedings in the assembly and that freedom must not be impeached or questioned in any court or place outside the assembly. It provides for parliamentary privilege in respect of legal proceedings. There is no specific provision relating to an offence of contempt of assembly, rather the assembly may determine that an offence has been committed against the assembly and impose a penalty upon the offender.

1042. A case involving the issue of parliamentary privilege is the 1990 District Court action between Mr. Lewis MP, and Stephen Wright and The Advertiser newspaper. In the South Australian House of Assembly, Mr. Lewis asked a question in relation to Mr. Wright and a subdivision of Mr. Wright's property. Mr. Wright gave a response by letter published in The Advertiser, accompanied by an article. Mr. Lewis issued proceedings claiming damages for defamation against Mr. Wright and The Advertiser. Interrogatories seeking information of Mr. Lewis were objected to as an infringement of parliamentary privilege and were struck out. The matter was appealed to the Full Supreme Court. Two judges of the Full Court were of the view that in the circumstances of this case a defendant faced with an action by a member of parliament for defamation has a right to cross examine the member of parliament as to the facts of the statement which was made in parliament.

Contempt of court

1043. Common law principles concerned with the powers of a court to deal with matters such as maintenance of order in a courtroom, attempts to influence participants in a case (including by publication of material), public denigration of judges and intentional disobedience of court orders are generally referred to as contempt of court. In a decision of the High Court in Gallagher v. Durack (1983) 152 CLR 238, a majority of the Court explained the relationship between contempt of court and freedom of expression in the following way:

> "The law endeavours to reconcile two principles, each of which is of cardinal importance, but which, in some circumstances, appear to come in conflict. One principle is that speech should be free, so that everyone has the right to comment in good faith on matters of public importance, including the administration of justice, even if the comment is outspoken, mistaken or wrong-headed. The other principle is that, 'it is necessary for the purpose of maintaining public confidence in the administration of law that there shall be some certain and immediate method of repressing imputations upon Courts of justice which, if continued, are likely to impair their authority' ... The

> authority of the law rests on public confidence, and it is important to the stability of society that the confidence of the public should not be shaken by baseless attacks on the integrity or impartiality of courts or judges. However, in many cases, the good sense of the community will be a sufficient safeguard against the scandalous disparagement of a court or judge, and the summary remedy of fine or imprisonment 'is applied only where the Court is satisfied that it is necessary in the interests of the ordered and fearless administration of justice and where the attacks are unwarrantable'."

1044. Proposals to amend contempt of court principles are discussed above in the commentary on article 14.

## Article 20

1045. Australia has maintained its reservation to article 20. The reservation provides:

> "Australia interprets the rights provided for by articles 19, 21 and 22 as consistent with article 20; accordingly, the Commonwealth and the constituent states, having legislated with respect to the subject matter of the article in matters of practical concern in the interests of public order (ordre public), the right is reserved not to introduce any further legislative provision on these matters."

1046. The reservation reflects Australia's strong tradition of freedom of expression. This is a tradition to which the federal and state governments are committed. Where there is a clear necessity to restrict that right in the public interest or, perhaps, for reasons of international diplomacy, the Federal Government will act, and has acted, to prohibit or suppress propaganda. For example, during the Second World War, the Federal Government prohibited propaganda by enemy aliens and subjected some forms of communication to censorship.

1047. A number of reports to the Federal Government have highlighted the existence of racial violence in Australia. In response, the Federal Government passed the Racial Hatred Act 1995 which came into operation on 13 October 1995. It provides an important avenue of complaint to the Human Rights and Equal Opportunity Commission for people affected by racially offensive conduct. The Act strikes a balance between the right to freedom of expression and the rights of all persons to live free from fear of violence and racial hatred. Nothing which is said or done reasonably and in good faith in the course of any statement, publication, discussion or debate made or held for an academic, artistic, or scientific purpose, or for any other purpose in the public interest, can be the subject of a complaint under the Act.

### Propaganda for war

1048. There is no general prohibition in Australia on propaganda for war. The Federal Government has some difficulty with the vagueness of the term "propaganda for war" used in article 20. As indicated in the previous section, the Government would only be prepared to prohibit propaganda of this nature if a clear need for such action arose.

1049. A number of actions which could fall within the concept of "propaganda for war" are currently prohibited. For example, the Crimes (Foreign Incursions and Recruitment) Act 1978 prohibits the recruitment and training within Australia of persons proposing to engage in hostile activities in foreign countries and prohibits Australian citizens and longer-term residents from engaging in such activities.

1050. Also of relevance are the crimes of treachery and sedition under the Federal Crimes Act 1914. Legislation of some relevance in prohibiting certain types of related propaganda is the Diplomatic and Consular Missions Act 1978 which empowers a court to grant an injunction restraining false claims to diplomatic or consular status and to issue a warrant to remove flags, insignia, etc., associated with such false claims.

1051. Australia has accepted several "information offices" for political organizations such as the South West Africa Peoples' Organization (SWAPO), the Front National de Liberation Kanake et Socialiste (FLNKS) and the Palestine Liberation Organization. It is stipulated that their purpose is the dissemination of information only. The offices must not advocate violence as a means of achieving their objectives. They do not have any privileged status. They are subject to Australian law and do not receive any financial assistance from the Australian Government. Confirmation that these terms are acceptable is required before the establishment of an "information office" will be supported.

## Incitement

1052. While there is currently no general prohibition on the incitement of discrimination, hostility or violence by advocating national, racial or religious hatred, there are some restrictions on incitement.

1053. Section 7A of the Federal Crimes Act 1914 provides that it is an offence for any person to:

> Incite to, urge, aid or encourage; or
>
> Print or publish any writing which incites to, urges, aids or encourages;
>
>> The commission of offences against any federal or territory law or the carrying on of any operations for or by the commission of such offences.

1054. The Federal Crimes Act 1914 also creates offences of sedition, including counselling, advising or attempting to procure the carrying out of a seditious enterprise. "Seditious enterprise" is defined to include enterprises carried out for the purpose of promoting "feelings of ill-will and hostility between different classes of Her Majesty's subjects so as to endanger the peace, order or good Government of the Commonwealth". (Exceptions exist for certain actions done in good faith.)

1055. Provision also exists in the Federal Crimes Act 1914 to enable the Federal Attorney-General to apply to the Federal Court for a declaration that a body of persons is an unlawful association. Such bodies include organizations which by propaganda advocate or encourage the overthrow by force or violence of the established federal or state government or that of any other civilized country or that of organized government. It is an offence for any person by speech or writing, inter alia to advocate or encourage overthrow by force or violence of such government. It is also an offence for a person, by violence or by threats or intimidation of any kind, to hinder or interfere with the free exercise or performance, by any other person, of any political right or duty.

### State legislation

1056. State legislation also provides for offences of incitement to violence. There are also a number of more specialized offences in some jurisdictions. New South Wales, the Australian Capital Territory and Western Australia have passed racial vilification legislation. At common law it is unlawful to incite a crime.

1057. In Queensland, the crime of sedition is dealt with in the Criminal Code 1899. A seditious intention is an intention to effect any of the following purposes:

> To bring the Sovereign into hatred or contempt;
>
> To excite disaffection against the Sovereign or the Government or Constitution of Queensland as by law established, or against the Parliament of Queensland or against the administration of justice;
>
> To attempt to procure the alteration of any matter in the state as by law established otherwise than by lawful means; and
>
> To promote feelings of ill-will and enmity between different classes of Her Majesty's subjects.

1058. The Act makes it unlawful to engage in an enterprise undertaken to effect a seditious intent or to administer an oath to bind a person to treason or murder.

1059. In Victoria the offence of treason is contained in the Crimes Act 1958. The common law offence of incitement has been abolished and replaced by a statutory offence.

1060. State legislation that prohibits racial discrimination is discussed further under article 26, Racial Discrimination, below.

## Article 21

1061. All persons in Australia are free to organize and participate in assemblies except to the extent to which legislation or the common law may regulate the same. The type of regulation varies depending on the jurisdiction. It is for this reason that no Australian jurisdiction other than Queensland provides a right to peaceful assembly. On the other hand no jurisdiction in Australia proscribes the right to peaceful assembly. The following discussion outlines first criminal regulation, second licensing legislation and finally the available remedies.

### Criminal legislation

1062. In general, all assemblies, whether held in public or in private places, are subject, in the interests of public order and other peoples' rights and freedoms, to the controls that are available under the criminal law to deal with situations where it is apprehended that riotous behaviour or a breach of the peace will otherwise occur. The relevant common law offences are the offences of affray, rout and riot. Relevant statutory offences include taking part in an unlawful assembly, misbehaviour at a public meeting, trespass, incitement to the commission of an offence, offensive behaviour, using indecent language and obstructing the police.

1063. The offence of taking part in an unlawful assembly exists in the Northern Territory, the Australian Capital Territory, Western Australia and Tasmania. In Tasmania, Western Australia and the Northern Territory the offence is found in the criminal code as part of the chapter dealing with unlawful assemblies and breaches of the peace. In general, an assembly is unlawful if three or more persons gather together with a common purpose, legal or illegal, in circumstances which cause alarm or fear in persons in the neighbourhood, or where the persons engaged in the assembly manifest such intention as to give persons in the neighbourhood reasonable grounds to apprehend a breach of the peace.

1064. In the Australian Capital Territory and elsewhere on federal government premises, the Public Order (Protection of Persons and Property) Act 1971 applies in regard to public assemblies. The Act makes it an offence to take part in an assembly "in a way that gives rise to a reasonable apprehension that the assembly will be carried on in a manner involving unlawful physical violence to persons or unlawful damage to property".

1065. A similar provision covers assemblies in relation to protected premises or a protected person (diplomatic and consular premises and personnel, international organizations and certain personnel). There are also offences created by the Act to deal with actual violence or damage and with possession of weapons, while taking part in an assembly.

1066. In the Northern Territory, the Observance of Law Act 1921 creates the offence of misbehaviour at a public meeting. It also empowers a chairperson (a person in charge of the conduct of, or presiding over, a public meeting) to direct a police officer to remove a person committing such an offence. The Police General Orders require the officer in charge of a police station to be aware of any political meeting which is to be open to the public occurring in his or her area. Sufficient police are to be rostered for duty to cope with the number of people likely to attend. If possible, plain clothes police should discreetly mingle with the crowd, while uniform police are to be deployed visibly to the best advantage. The police are to be strictly neutral in their attitude at such meetings, other than to see that the lawful directions of the chairman are carried out.

1067. Where it becomes apparent that the meeting may take a violent turn, the police officer in charge is to take all possible precautions against injury being caused to persons attending either as speakers or spectators. Where numbers permit and the mood of the times indicate it is a wise move, a bodyguard should be assigned to the central figures appearing at the meeting. In such cases, if suitable warning has been received, written orders should be prepared to cover such a contingency.

1068. In Tasmania, the Police Offences Act 1935 makes it an offence to disrupt a public meeting in or near any hall, room or building in which such meeting is being held.

1069. In relation to the offence of offensive behaviour mentioned above, evidence of the mere expression of political views or offence to the canons of good taste is not considered to be sufficient to convict (Ball v. McIntyre (1966) 9 FLR 237). Similarly, the disobedience of a police officer's command to cease a lawful activity would not constitute obstruction (Forbutt v. Blake (1981) 51 FLR 465).

## Licence legislation

### New South Wales

1070. In New South Wales, the Summary Offences Act provides some measure of protection to participants in a public assembly or procession.

1071. Part four of the Summary Offences Act provides a scheme whereby the organizer of a proposed assembly or procession in any public place is required to give written notice at least seven days in advance to the Commissioner of Police or to a member of the police force. Failure to do so is not an offence. However, participants in an assembly which is not "authorized" lose immunity from the consequences of acts done for the purposes of participating in the unlawful assembly, or for obstructing any person or vehicle in a public place.

1072. If a notice is served less than seven days before the date of the assembly, or the Commissioner has not notified the organizer that there is no opposition to the holding of the assembly, the organizer may apply to a court for an order authorizing the assembly. Under section 25 of the Act, the Commissioner can apply to the Supreme Court for an order prohibiting the assembly. The Commissioner cannot apply for an order unless he or she has invited and considered representations from the organizer of the proposed assembly.

Queensland

1073. The Queensland Peaceful Assembly Act 1992 commenced on 23 July 1992. The objects of the Act are to:

Recognize the right of peaceful assembly;

Ensure, so far as it is appropriate to do so, that persons may exercise the right to participate in public assemblies;

Ensure that the exercise of the right to participate in public assemblies is subject only to such restrictions as are necessary and reasonable in a democratic society in the interest of:

Public safety;

Public order; and

The protection of the rights and freedoms of other persons; and

Ensure that the rights of persons to participate in public assemblies may be exercised without payment of a fee, charge or other amount for a licence, permit or other authorization.

1074. Under the Peaceful Assembly Act 1992, public assemblies may be authorized or unauthorized. Unauthorized assemblies must conform to traffic laws and relevant local authority laws. An unauthorized assembly is, nevertheless, lawful in itself. On the other hand, an authorized peaceful assembly invokes the immunity provisions in the Act and participants risk no civil or criminal liability for obstructing a public place if it is conducted substantially in accordance with the terms of the authorization. The Act requires the organizer of an assembly in a public place, if it is desired that the assembly be accorded the status of an authorized assembly, to give notice of intention to hold the assembly to the Commissioner of Police and the local authority. If the assembly will pass through a public place over which another local authority has jurisdiction, the other local authority must also be notified. Where the notice is given five or more days before the day on which the assembly is proposed to be held, the Commissioner or the local authority (or any of the local authorities, where more than one has been notified) may, in certain circumstances, apply to the Magistrates Court to refuse the holding of the assembly. These circumstances include the completion of specified consultation and mediation processes and the applicant, having regard to the objects of the Act, having formed the opinion on reasonable grounds that the assembly would jeopardize the safety of persons, cause serious public disorder, or interfere with persons' rights or freedoms.

1075. Where less than five business days notice is given of a proposed public assembly, the organizer may apply to the Magistrates Court for authority to hold the assembly. The organizer is not obliged to make an application to the court if each relevant authority has notified the organizer in writing that it does not oppose the holding of an assembly, or if a specified mediation process has not been followed by the organizer.

### South Australia

1076. In South Australia, the Public Assemblies Act 1972 provides that notice may be given to either the Minister, Commissioner of Police or clerk of the local council of an intention to hold an assembly in a public place. Any of these three persons can lodge an objection to the assembly which is then determined by a judge. Where notice is given and there are no objections to it and the conduct of the assembly conforms with the proposal, a person participating in the assembly does not incur any civil or criminal liability by reason of the obstruction of a public place. The Act does not provide any specific remedy for interference with a lawful assembly.

1077. Section 59 of the Summary Offences Act 1953 allows the Commissioner of Police, or the mayor or chairman of a council to give reasonable directions to regulate traffic and maintain order in the event of any "special occasion" in a public place. Where a direction has been given under the section, a police officer may give to a person orders calculated to ensure compliance with the direction. Failure to comply with such an order is an offence.

### Tasmania

1078. The Traffic (Miscellaneous) Regulations 1968 require that where a procession is to be held in Hobart, Glenorchy or Launceston, a permit be issued by the Commissioner of Police. It is an offence to take part in a procession unless such permit has been obtained and the directions of the Commissioner must be followed.

### Western Australia

1079. The Western Australian Public Meetings and Processions Act 1984 provides that a person or body proposing to hold a public meeting or a procession in a street is to apply to the Commissioner of Police for a permit. The police may grant a permit free of, or subject to, conditions or may, if they reasonably apprehend serious public disorder or property damage or a public nuisance or an excessive obstruction or danger to safety, refuse a date on which it is to be held. A dissatisfied applicant may appeal to a magistrate. People who participate in a public meeting or procession in accordance with a permit do not thereby offend against other laws relating to movement of traffic or pedestrians or to the obstruction of a street.

### Remedies

1080. No specific remedies are provided for, should a lawful assembly be improperly interfered with or otherwise prevented. However, depending upon the circumstances of the interference, actions for assault or false imprisonment may be available. All jurisdictions have provisions for the hearing of complaints by an independent tribunal or an Ombudsman which could apply to any interference by the police. The Human Rights and Equal Opportunity Commission is empowered to investigate complaints against action taken by federal agencies or under federal laws should those actions or laws infringe upon the right granted by this article.

## Article 22

1081. There are few restrictions in Australia on the freedom of association. Except for associations proscribed as unlawful associations, legislation is usually concerned with regulating the forms of association and the attendant powers and obligations. Political groups and human rights organizations have the same freedom to associate as organizations formed for other purposes. The following discussion briefly outlines the types of associations recognized under Australian law, then deals in turn with the regulation of political parties, human rights organizations, unlawful associations and trade unions.

### Types of associations

1082. There are a variety of ways in which associations can operate under Australian law. Pursuant to the terms of the national corporations law, associations can be incorporated or unincorporated. Incorporated associations are granted many benefits. For example, they can act as legal persons, sue and be sued, can hold property and can undertake commercial transactions. They have to submit to certain regulations, for example, to make public their objects, to submit audited accounts and to maintain registers of shareholders and proprietors.

1083. For smaller groups, such as community organizations or clubs, the benefits of incorporation may not be seen as outweighing the informality and flexibility of maintaining the group as an unincorporated association.

1084. In relation to clubs, some jurisdictions provide for the registration of certain clubs, usually larger clubs which operate from their own premises and which hold a liquor licence.

1085. While most anti-discrimination legislation specifically applies to membership of clubs, the extent of its application and exceptions varies. For example, the Victorian Equal Opportunity Act 1995 applies to social, recreational, sporting or community service clubs or community service organizations which are in occupation of Crown land or directly or indirectly in receipt of financial assistance from the state government or a municipality. The Western Australian Equal Opportunity Act 1984 and the Commonwealth Sex Discrimination Act 1984 cover clubs of not less than 30 persons where the association provides and maintains its facilities, in whole or in part, from the funds of the association and sells or supplies liquor for consumption on its premises. The Australian Capital Territory Discrimination Act 1991 applies to clubs holding a club licence under the Liquor Act 1975.

### Political parties

1086. Australian law does not impose any restriction on the free formation of political associations, including political parties. A political party may choose to constitute itself in various forms, including as an unincorporated or an incorporated association. However, the Commonwealth Electoral Act 1918 gives statutory recognition to the existence of political parties.

1087. The Commonwealth Electoral Act 1918 requires registration if a party intends to place its name next to its candidates on a ballot paper, and is also necessary in order to claim election funding. There do exist unregistered parties, and their candidates are still permitted to stand for election, although not under the party's name.

1088. There are some requirements which must be met if a political party wishes to be registered under this Act. In order to be registered, a party must have at least one member elected to Federal Parliament or to that of any of the states, or have at least 500 members, and must be established on the basis of a written constitution. The Act also prescribes that certain names may not be registered such as those that are obscene or are too closely related to the name of an already registered political party. The Act provides for an appeal to the Administrative Appeals Tribunal against a decision not to register or to cancel the registration of a political party.

1089. The Commonwealth Electoral Act 1918 imposes some controls upon the activities of political parties in Australia. For example, a person who is a candidate in an election must furnish to the Electoral Commission a statement of the amount or value of gifts received and the relevant details of each gift received during an election period. The Act prohibits the receipt of donations which exceed a certain amount unless the name and address of the donor are known by the political party. In addition, all candidates in an election must furnish to the Electoral Commission a statement setting out the details of expenditure incurred during the election period. Under the Act, all political parties must provide financial returns at the end of each financial year setting out the total amount received and expended during the year.

1090. Australia currently has more than 25 political parties registered under the Commonwealth Electoral Act 1918, including the Australia's Indigenous Peoples Party, Australian Democrats, Australian Labor Party, Call to Australia (Fred Nile) Group, Liberal Party of Australia, National Party of Australia and Republican Party of Australia.

Human rights organizations

1091. As stated above, there is no regulation specific to the operation of non-government human rights organizations in Australia. Human rights organizations are free to associate as incorporated or unincorporated associations.

1092. At a federal level, the Government encourages human rights organizations through both direct funding and, more indirectly, through consulting with human rights organizations in relation to certain justice issues. In relation to consultation, human rights organizations currently meet with the Federal Government regularly in a forum to discuss human rights issues from an international perspective.

1093. Human rights organizations were also involved in the preparation of the first human rights National Action Plan and in the Federal Government's preparation for the Copenhagen World Summit for Social Development and the

World Conference on Human Rights. The Australian delegation to the World Conference on Human Rights included representatives from non-governmental organizations.

Unlawful associations

1094. Certain associations are unlawful under Australian law. For example, section 30A of the Commonwealth Crimes Act 1914 provides that associations which by their constitution or propaganda advocate or encourage the overthrow, by force or violence, of the Constitution or established Governments, or are associated with associations having such a purpose, or advocate or encourage the doing of a seditious act, are unlawful. Membership of, or assistance provided to, such an association generally constitutes a criminal offence under the Act.

1095. Some Australian jurisdictions also have legislation which makes it an offence to consort habitually with reputed criminals ("thieves" in some jurisdictions), known prostitutes or persons who have been convicted of having no lawful means of support. The purpose behind this legislation is to prevent crime by discouraging criminal associations. Such legislation is considered to be necessary in the interests of public safety and order and the rights and freedoms of others.

Trade unions

1096. The right of existence of trade unions and freedom to organize in the interests of their members is accepted by the Australian community.

1097. The Australian Bureau of Statistics Supplementary Survey, Working Arrangements in Australia, August 1994, showed:

> There were 6,525,800 employees in Australia at the time of the survey;
>
> 2,283,400 employees were trade union members in their main job, equal to 35 per cent of all employees; and
>
> 37.9 per cent of male employees and 31.3 per cent of female employees were trade union members.

1098. Trade union membership is, however, declining. It decreased by 109,900 or 4 per cent in the year to 30 June 1994. From 1990 to 1991 trade union membership decreased by 1 per cent, from 1991 to 1992 by 7 per cent and from 1992 to 1993 by 4 per cent.

1099. There are no formal or substantive prerequisites for the formation or functioning of a trade union in Australia. However, in order to receive registration or recognition under the various federal and state industrial relations systems a trade union must meet certain statutory requirements. These requirements vary from jurisdiction to jurisdiction and are discussed below. Registration or recognition under the various industrial relations systems will confer certain benefits and obligations.

## Registration

### Federal legislation

1100. The Commonwealth Industrial Relations Act 1988 governs the federal industrial relations system. Broadly, the conditions for registration under the federal system are that the trade union:

Be a bona fide organzation of employees;

Have a minimum number of members (see section, Union size, below);

Have rules which provide for specified matters such as democratic organization and the terms and conditions upon which a person may become or cease to become a member of the organization.

## Benefits to registration

### Right to join a union

1101. First, the Federal Act protects the right of individuals to join trade unions. Subsection 261 (1) of the Act provides that:

> "Subject to any award or order of the Australian Industrial Relations Commission, a person who is eligible to become a member of an organisation of employees under the eligibility rules of the organisation that relate to occupations in which, or the industry in relation to which, members are to be employed is, unless of general bad character, entitled, subject to payment of any amount properly payable in relation to membership:
>
> to be admitted as a member of the organisation; and
>
> to remain a member so long as the person complies with the rules of the organisation."

1102. Subsections 261 (7) to (12) provide procedures under which the Industrial Relations Court established by the Act (see below) may hear and determine applications concerning the right of a person to become, or remain, a member of an organization registered under the Act.

### Protection against discrimination

1103. Secondly, the Industrial Relations Act 1988 provides that it is an offence for an employer to dismiss an employee or to prejudice his or her position because of membership or participation in a trade union. It is also an offence to induce an employee to stop being a member of a trade union.

1104. Thirdly, the Industrial Relations Act 1988 provides for the right to strike in certain circumstances under the Act. Except for conduct which involves, or is likely to involve, personal injury; wilful or reckless destruction of, or damage to, property; or the unlawful taking, keeping or use of, property, no action lies under any law of a state or territory in respect of industrial action that is "protected action".

1105. "Protected action" refers to industrial action taken in support of or to advance claims made by an employee or by a registered trade union for a certified agreement. Such industrial action is protected only during the "bargaining period" in respect of such an agreement. The "bargaining period" commences seven days after a party gives written notice to the other proposed party or parties and to the Australian Industrial Relations Commission stating that the party wishes to reach an agreement and have it certified. The "bargaining period" ends when a written agreement is entered into, or if the initiating party tells the other party or parties in writing that it no longer wishes to reach an agreement, or the Australian Industrial Relations Commission terminates the period in accordance with the legislation.

### Secondary boycotts

1106. Amendments to the Industrial Relations Act 1988 included insertion of section 162 which prohibits secondary boycotts. The prohibition does not however, apply where the boycott action is in support of claims that directly affect the person taking the action. Peaceful picketing is also exempt from the prohibition.

1107. Criminal proceedings do not lie against a person merely because that person has engaged in boycott conduct. Further, a person who has suffered loss or damage by boycott conduct may recover the amount of the loss or damage by action in the Industrial Relations Court.

### Obligations on registration

1108. Registration of trade unions is not compulsory and involves certain obligations. In the federal system, for example, those obligations include:

Compliance with certain statutory requirements designed to ensure the democratic control of organizations by their members and the protection of the members' interests;

The duty to notify the Australian Industrial Relations Commission (AIRC) of disputes to which the organization is a party and to appear before AIRC when required in proceedings concerning a dispute to which the organization is a party; and

Acceptance, subject to statutory rights of review and appeal, of the decisions of AIRC in relation to matters affecting the organization concerned and its members (non-compliance with awards and orders of AIRC is a ground for seeking the cancellation of an organization's registration).

Collective bargaining

1109. In 1993, the Federal Government amended the Industrial Relations Act 1988 to establish a system of certified agreements and enterprise flexibility agreements to replace the industry based award structure.

Union size

1110. In 1990, the Federal Government increased the minimum number of members which a trade union must have to be granted registration under the Industrial Relations Act 1988 from 1,000 to 10,000. Provision was also made for the eventual deregistration of registered trade unions with less that 10,000 members unless they could demonstrate that special circumstances existed which justified their continued registration.

1111. The minimum membership requirements were the subject of a complaint by the then Confederation of Australian Industry and the International Organisation of Employers to the International Labour Organization's Committee on Freedom of Association. This became Case No. 1559. The complaint alleged that the minimum membership requirements unreasonably restricted the registration of new employees' organizations of their own choosing in individual enterprises and small industries and restricted the freedom of employees to choose to which union they belonged.

1112. After examining the complaint and the Government's response, the Committee concluded that the introduction of the 10,000 minimum membership requirement "could unduly influence the workers' free choice of union to which they wish to belong, even when federal registration is only one of the alternatives available for protecting their rights".

1113. The Committee recommended that the Government "take measures so that it is not a requirement that a union have 10,000 members or demonstrate special circumstances to claim access to the benefits deriving from registration under the federal system".

1114. Subsequently the Federal Government amended the Industrial Relations Act 1988 to, among other measures, reduce the minimum membership requirement for trade unions seeking registration or already registered from 10,000 to 100 and to remove the provisions dealing with a review of the registration of organizations with less than the minimum number of members. Those amendments came into effect on 2 January 1994.

1115. Table 18 presents the numbers of trade unions according to size. The number of federally registered unions has decreased from 148 in December 1984 to 47 in August 1995.

Industrial Relations Court

1116. The Industrial Relations Court of Australia commenced operation on 30 March 1994. The responsibilities of the Court include:

> Enforcement and interpretation of awards and orders of the Australian Industrial Relations Commission;

Certain matters concerning registered organizations and their members;

Actions relating to secondary boycotts;

Actions relating to unfair dismissal; and

Enforcement of employees' entitlements under the new minimum entitlements provisions.

1117. Some of these matters were the responsibilities of the former Industrial Division of the Federal Court, but there are significant new areas of work for the court.

1118. A total of 11 judges from around Australia have been appointed to the bench of the Industrial Relations Court, ensuring that a judge is available in most capital cities. All judges hold dual appointments on the Industrial Relations Court and the Federal Court.

## State legislation

### New South Wales

1119. On 23 August 1991, the New South Wales Industrial Arbitration (Unions) Act 1991 commenced. The new Act rationalizes industrial organizations in New South Wales. New industrial unions of employers and employees, and trade unions, will become registered and incorporated under the Industrial Arbitration (Unions) Act 1991.

1120. Measures relevant to preserving the status of existing industrial unions and trade unions have been carefully reviewed. First, existing unincorporated industrial unions will retain their registration under the Industrial Arbitration (Unions) Act 1991 and will become incorporated on confirmation by the Industrial Registrar that the industrial union complies with the requirements of the new Part 11 of the Act. Secondly, existing industrial unions which are already incorporated under other New South Wales acts will continue to be registered under the Act and will have to comply with relevant requirements of the new Part 11, but will otherwise be governed by the provisions of the act under which they became incorporated. To assist in the smooth transmission from the old to the new system, transitional provisions provide existing industrial unions of employers and employees, and trade unions, with a period of 18 months from the commencement of the new provisions to comply with the new requirements of Part 11 of the Industrial Arbitration (Unions) Act 1991.

1121. The Act deals with the elections and duties of officers, and the financial accountability of unions and their officials. It further provides that, other than in the case of suspension or cancellation under the Essential Services Act 1988, where an industrial union engages in wrongful conduct, the Industrial Commission may either suspend or cancel the registration of the industrial union concerned, depending on the gravity of the misconduct.

## Queensland

1122. The legislative system of industrial regulation in Queensland provides for and encourages the registration of industrial organizations of employees and employers as such organizations are essential to the functioning of the industrial system.

1123. Part 14, "Industrial Organizations", of the Industrial Relations Act 1990 makes provision, among other matters, for the registration of industrial organizations of employers and employees, as well as resignation of members from membership of industrial organizations.

1124. Division 2 of Part 14 of the Industrial Relations Act 1990 outlines the requirements and procedures for obtaining registration. In particular, section 328 outlines the procedural arrangements which must be observed when an association applies for registration.

1125. An application for registration of an employer association must be accompanied by a list of membership details providing employers' names and business addresses; a list of appointees; the association's rules; in the case of an association consisting of more than one person, a copy of a resolution in favour of registration; a list of callings in which the employees are employed; particulars of the control of the association's property and investment funds; and the appropriate fee.

1126. A numerical criterion is placed on both employer and employee associations applying for registration unless the industrial commission is satisfied that special circumstances exist which justify registration. The Act provides that an employee organization must have at least 100 members who are employees. An employer association must have as members employers who have, in the aggregate, employed on an average, taken per month, at least 100 employees throughout the period of six months immediately preceding the date of the application.

1127. In addition, the Industrial Relations Act 1990 also provides that registration will not be granted unless:

> The association rules comply with the Act and are approved by the state commission;
>
> The association name is not the same as that of an existing organization;
>
> The registration of the association would further the objects of the Act; and
>
> There is no industrial organization to which the members could conveniently belong.

1128. Section 387 of the Industrial Relations Act 1990 provides the manner of resignation of a member from an industrial organization. Membership of an industrial organization is terminated if a member gives written notification of the resignation either by post or by delivery to the organization.

## South Australia

1129. The Industrial and Employee Relations Act 1994 provides for the establishment of industrial associations of employees. The Act provides for an absolute freedom of association such that no person may be compelled to become or to remain a member of an association. Similarly, no person who is eligible for membership of an association may be prevented (except by the association itself acting in accordance with its rules) from becoming or remaining a member of an association.

1130. Section 122 of the Industrial and Employee Relations Act 1994 provides the grounds on which the South Australian Industrial Relations Commission may register an association. Effectively, the association must be eligible for registration (that is, have not less than 100 employees as members or be a branch, section or part of a federally registered union); the rules of the association must conform with the requirements of the Act; certain prescribed conditions (if any) should be complied with; and the registration of the association needs to be consistent with the provisions and objects of the Act.

1131. In South Australia, it is illegal to discriminate against or in favour of a person on the ground of a person's membership or non-membership of a union.

## Victoria

1132. The Employee Relations Act 1992, which replaces the Industrial Relations Act 1979, provides recognition for "associations of employees". Recognition may be granted if the association is a "genuine association with respect to the employer or industry concerned" and has been authorized by an employee engaged by the employer or in the industry concerned to represent the employee on negotiations or proceedings. Recognition gives the association the right to appear in proceedings and to represent its members in relation to an employment agreement.

## Western Australia

1133. The Industrial Relations Act 1979 has been amended to provide that it is illegal for one person to treat another either favourably or unfavourably on the basis of membership or non-membership of an organization of employees or employers.

## Territories

1134. During 1992, the Territories Office held discussions with a range of organizations, including the Australian Council of Trade Unions, the Western Australian Trades and Labour Council, the Union of Christmas Island Workers, other unions and relevant Commonwealth and Western Australian government agencies in regard to normalizing industrial relations in the Indian Ocean territories.

1135. The Federal Industrial Relations Act 1988 was extended to Christmas Island and the Cocos (Keeling) Islands from 1 July 1992. The Minister for Industrial Relations agreed to register the Union of Christmas Island Workers (UCIW) for a period of three years under the Industrial Relations Act 1988, and deem awards under the Christmas Island Industrial Relations Ordinance 1976 to be awards of the Australian Industrial Relations Commission. UCIW applied and has been granted registration as an organization of employees under the Industrial Relations Act 1988.

1136. The Employment Act 1988 of Norfolk Island provides protection from dismissal or prejudice to an employee's employment by reason that that employee is, or proposes to become, an officer, delegate or member of an organization for furthering or protecting the interests of employees generally or a class of employees.

## Article 23

1137. In Australia, the family is a fundamental social unit and its importance is given implicit and explicit recognition. Responsibility for marriage and protection of the family is shared between the Federal Government and the states. Section 51 of the Australian Constitution grants the Federal Government power to make laws for the "peace, order and good government" of Australia with respect to, inter alia:

> Marriage;
>
> Divorce and matrimonial causes; and in relation thereto, parental rights, and the custody and guardianship of infants; and
>
> The provision of maternity allowances, widow's pensions and child endowment.

1138. The Federal Government has power to make laws in respect of marriage, divorce and matters such as parental rights, custody and guardianship of infants in a divorce. The states have constitutional responsibility for de facto relationships. Responsibility for the regulation and delivery of community and health services primarily also rests with the state governments.

1139. Pursuant to its constitutional powers, the Federal Parliament has enacted the Marriage Act 1961, the Family Law Act 1975 and various pieces of social welfare legislation.

### The family

1140. The principle that the family is the fundamental unit in society is explicitly referred to both in the Federal Family Law Act 1975 and relevant state legislation. For example, it appears in the Western Australian Family Court Act 1975, the South Australian Children's Protection Act 1993 and the Family and Community Services Act 1972.

1141. In a further step to recognize the principle in a positive way, the Federal Family Law Act 1975 created an Institute of Family Studies, which has the function of encouraging coordinated research into the factors affecting marital and family stability in Australia, with the object of promoting the protection of the family as the natural and fundamental unit in society. States also have mechanisms whereby the principle is reinforced. For example, in South Australia the Office for Families and Children promotes across-government awareness of the issues and needs of families, and the use of family impact statements by government to assess and take into account the impact of government decisions on families.

1142. In Australia, in line with trends in other Western countries, the conventional nuclear family is by far the most prominent family form. In Australia in 1993 there were 4.63 million families. As is shown in table 19, these families were comprised of the following living arrangements: 42.9 per cent were couple families with children; 9 per cent were one-parent families with children; 32 per cent were couples only; and persons aged 15 years or more living alone were 10.2 per cent.

1143. One-parent families headed by females have increased over the past decade. The number of de facto couples has also increased. In 1992 8 per cent of all couples were in de facto relationships and 56 per cent of couples who married in 1992 had lived together before marriage, compared to 16 per cent of couples who married in 1975. Furthermore, in 1993 children born outside of marriage accounted for 25 per cent of all births, an increase from 6 per cent in 1963. This increase has been matched by an increase in acknowledgment of paternity (see table 20).

1144. There is also a higher than historically normal frequency of couples with no children present. The child population over the past 20 years has remained fairly constant at approximately 3.8 million. However, the proportion of children in the population has decreased from around 30 per cent in the late 1950s to 22 per cent in 1993, and by 2041 it is projected to decline to between 17 and 19 per cent. This is due to the decline in the fertility rate, from 2.5 children per woman in 1973 to 1.9 children in 1993. In 1992 the average number of children in a couple family was 1.9 and 1.6 in a one-parent family.

1145. Over the last 20 years marriage rates have fallen and the average age at first marriage has increased (see table 21). This is partly the result of economic downturn, changes in divorce laws and changes in attitudes to marriage and living arrangements. In 1993, the average age for all marriages was 26 years for women and 29 years for men.

1146. The Federal Government used the International Year of the Family to celebrate Australian families by promoting an increased understanding of their contribution to Australian society. Also during the International Year of the Family, the South Australian Government appointed Family Ambassadors and a Family Summit will be held shortly.

1147. In 1994, the Federal Government appointed a Family Services Council to advise it on family services issues. The Council includes representatives of the three peak bodies that are funded to provide family services -

Relationships Australia, Centacare Australia and Family Services Australia. It also includes people chosen for their specialist expertise and broad knowledge of family services issues.

## Family support measures

1148. All Australian governments provide family support measures. Examples of programmes include early intervention and family preservation services for families where there is a high risk of children being removed; specific preservation services for families of children with disabilities; Aboriginal family support; marriage and relationship preparation and family skills programmes; and community centres and neighbourhood development.

1149. Further information relating to state matters appears in section E of Australia's initial report under the Convention on the Rights of the Child.

### Supplementary services grants

1150. Supplementary services grants are provided for children with special and/or additional needs to gain access to appropriate care in mainstream services and to ensure that services operate in a culturally or developmentally appropriate way.

### Programme support

1151. Programme support provides assistance for in-service training and management support to enhance the efficiency and skill base of federally funded childrens' services. Youth activities services provide structured activities and positive peer support in an innovative programme of after school and vacation services for children from 11 to 16 years of age.

## Migrants and ethnic families

1152. Family migration is an integral component of the migration programme. The Preferential Family category provides for the sponsorship of spouses, fiances, dependent children, children for adoption, parents, interdependent partners and other close relatives. Applicants must establish the closeness of their relationships to the sponsor, meet the relevant eligibility criteria and meet health and character requirements.

1153. Provision also exists for migration of extended family members (brothers, sisters, working-age parents who do not meet the "balance of family" test, non-dependent children, nieces and nephews) based on a points selection system. The points test assesses an applicant's occupational skills and age and awards additional points for the settlement characteristics of the Australian sponsor.

## Marriage

1154. Generally, in Australia all men and women of marriageable age have the right, subject to meeting the requirements of legal capacity, to enter into marriage. The right to marry and procedures for marriage are regulated in Australia by the Federal Marriage Act 1961. The rights and obligations of parties to a marriage (and the provisions applicable to a dissolution of the marriage) are dealt with in the Federal Family Law Act 1975, which extends to all states.

1155. Under the Federal Marriage Act 1961, marriages may be celebrated by a minister of religion registered as an authorized celebrant, by a district registrar or by other persons authorized by the Attorney-General as marriage celebrants. Notice of the intended marriage must be given to the celebrant at least one calendar month before the marriage, but this can be at any time not more than six calendar months prior to marriage. The marriage celebrant must transmit an official certificate of the marriage for registration to a district registrar in the state in which the marriage took place.

1156. In relation to the capacity of a person to contract a marriage, the Marriage Act 1961 provides that the impediments to a valid marriage are:

- A prior subsisting marriage;
- The existence of a prohibited relationship;
- The lack of real consent by reason that it was obtained by duress or fraud; and
- Lack of marriageable age.

1157. The minimum age at which people are legally free to marry is 18 for both males and females. A male or female aged between the age of 16 and 18 may marry a person of the opposite sex aged 18 or older with parental/guardian consent and an authorization from a judge or magistrate who, after due inquiry into the relevant facts and circumstances, is satisfied that the circumstances are so exceptional and unusual as to justify the making of an order which will authorize the marriage despite the fact that the applicant has not attained the age of 18 years.

1158. As stated above, a marriage is void if the consent of either of the parties is not real consent. Tribal marriages among Aboriginal and Torres Strait Islanders, which in some cases may not be by free and full consent of the intending spouses, are not recognized for the purposes of the Marriage Act 1961. They are, however, recognized for certain purposes in the Northern Territory, for example, in such matters as claims against the estate of a deceased spouse, and the status of children.

1159. In all jurisdictions, prisoners are able to marry subject to appropriate permission from the prison authorities. Requests are examined on a case by case basis which enables the authorities to take into account the needs of the prisoner and discipline in the prison system.

1160. Overseas marriages are also recognized in Australia. The general rule is that a marriage is recognized as valid in Australia if it was valid in the country where it took place at the time it was solemnized or if it later became valid in that country.

## Right to found a family

1161. The Government has provided funds for family planning at national and international level since 1973, and in 1974 established its Family Planning Program in the then Federal Department of Health, under which funds are provided to non-government family planning associations and natural family planning organizations in the states for education, information and training programmes at community and professional levels. All medical family planning services attract health insurance benefits.

1162. Under Medicare, a system of health programme grants provides that clinic services are in effect available free of charge. Oral contraceptives, the most popular form of contraceptive used by young women, attract a subsidy under the Pharmaceutical Benefits scheme, and other contraceptives are exempt from sales tax. The goal of the Family Planning Program is to work towards the sexual and reproductive health and well-being of all groups in the community in the context of a sustainable environment.

1163. Federal and state governments have basically uniform legislation relating to the parentage of children conceived by artificial insemination or in vitro fertilization procedures. The federal legislation, section 60B of the Family Law Act 1975, only operates in the context of that Act. The state legislation operates generally to deal with parentage for all purposes.

1164. Broadly speaking, state legislation deems the husband or de facto spouse of a woman who gives birth as a result of artificial insemination or in vitro fertilization to be the child's father for all purposes provided that he consented to the fertilization procedure. All jurisdictions, with the exception of New South Wales, also deal with maternity. In South Australia, the Northern Territory and the Australian Capital Territory, a woman giving birth to a child as a result of IVF with donor ovum is presumed to be the mother of the child. In Victoria, Queensland, Western Australia and Tasmania, the presumption is restricted to a married woman who has undertaken the procedure with her husband's consent.

## Adoption

1165. Regulation of the adoption of children in Australia is primarily a state responsibility. Most Australian states have reformed, or are in the process of reforming, their 1960s adoption legislation. Between 1964 and 1968 Adoption Acts were passed in all states based on a model bill which was approved by the Standing Committee of Attorneys-General. These Acts introduced the principle (already established in the law relating to custody disputes) that the welfare and interests of the child concerned shall be the paramount consideration. The adopted child is regarded as having been born in wedlock to the adoptive parents; that is, it legally ceases to be a child of its previous parents. Uniform principles for registration of adoption and the assumption of jurisdictional recognition of interstate and overseas adoption orders were also adopted.

1166. Further information relating to state and territory adoption matters appears in section E of Australia's initial report under the Convention on the Rights of the Child.

Rights and responsibilities of spouses

1167. Under the Federal Marriage Act 1961, the rights and responsibilities of spouses when entering into marriage are equal.

1168. Under Australian law a person does not automatically obtain citizenship upon marriage to an Australian citizen. The Australian Citizenship Act 1948 provides that a person may be granted Australian citizenship if, inter alia, he or she is over the age of 18 years and has been a permanent resident of Australia for an aggregate period totalling one of the two preceding years or two of the five years preceding the application. Australian citizenship may also be granted to a person who is a permanent resident and the spouse of an Australian citizen where that person has been continuously in Australia as a permanent resident for 12 months prior to the application and would suffer significant hardship or disadvantage if not granted Australian citizenship. In the unusual event of a person losing his or her nationality or citizenship upon marriage to an Australian citizen, the Department of Immigration and Ethnic Affairs may extend special concessions to that spouse which would expedite his or her being granted Australian citizenship to avoid the person being stateless. This avenue is available to the Minister under subsection 13 (9) of the Australian Citizenship Act 1948.

1169. The Act also prescribes the situations in which an Australian citizen can lose his or her citizenship. The Act provides that where an Australian citizen does an act or thing, the sole or dominant purpose of which is to acquire the nationality or citizenship of a foreign country and the effect of which is to acquire the nationality or citizenship of a foreign country, then the person ceases to be an Australian citizen. This provision, however, does not apply in relation to an act of marriage.

1170. Parental rights and responsibilities relating to the children not of a marriage are regulated by the Family Law Act 1975, except in Western Australia. In Western Australia, state law applies. In 1995, the Federal Government passed legislation amending the Family Law Act 1975 by replacing the concept of custody and its companion notion of access, and also removing the guardianship responsibilities currently conferred on parents. The concept of custody, especially, has carried with it notions of ownership of children. In some cases, it has tended to lead to the belief that the child is a possession of the parent who is granted custody, to do with as that parent pleases, including making the child available for access when that parent pleases, despite court orders to the contrary.

1171. The Act defines parental responsibility as all the duties, powers, responsibilities and authority which by law parents and guardians have in relation to children. Parents will no longer be the statutory guardians of the child but will have parental responsibility conferred upon them. It is important to note that the concept of parental responsibility does not expressly confer any rights on the parents in respect of the child. There is, for example, no longer a right of custody or a right of access. Rather parents will have a responsibility to discharge the obligation of parental responsibility in the best interests of the child. The Act also makes it clear that parental responsibility is not dependent on whether the parents are married or separated or whether they have never married or lived together.

### Divorce

1172. The Family Law Act 1975 established the Family Court of Australia, designed to provide a specialized jurisdiction within which matrimonial cases may be heard and settled. In Western Australia, the Family Court of Western Australia operates in the same way as the Family Court of Australia in other jurisdictions. Except in Western Australia, proceedings under the Family Law Act 1975 may be brought in the Family Court of Australia or, for some proceedings, in a relevant court of summary jurisdiction. In Western Australia, the Family Court of Western Australia exercises original jurisdiction under the Act. In the Northern Territory, the Family Court and the Supreme Court of the Northern Territory exercise concurrent jurisdiction under the Act. The Sydney Registry of the Family Court of Australia is the principal registry for family law matters in Norfolk Island other than those matters which may be dealt with by the Court of Petty Sessions.

1173. When a case reaches the Family Court of Australia, the Family Law Act 1975 requires the court to have regard to the need to give the widest possible protection and assistance to the family as the natural fundamental unit of society, particularly while it is responsible for the care and education of dependent children.

1174. The Family Law Act 1975 provides that a decree nisi of divorce does not become absolute unless the court has made an order declaring its satisfaction either that there are no children of the marriage under 18 or, where there are such children, that proper arrangements have been made for their welfare or that there are circumstances why the decree should become absolute in the absence of proper arrangements.

1175. Both the Family Court of Australia and the Family Court of Western Australia were established with a counselling segment as an integral part of the Court. In establishing the Family Court with a counselling service it was the intention of the Federal Government that parties be encouraged to settle their matters with assistance from professionals without the necessity for a court imposed solution. In addition to the counselling provided at the courts the Family Law Act 1975 provides for approved marriage counselling and mediation services, which are founded by the Federal Government and which are recognized as being able to provide like services to those provided by the Family Court counselling services.

### De facto relationships

1176. State law governs the property and financial relationships between de facto partners, although the Federal Family Court may be able to exercise jurisdiction in particular cases because of the operation of cross-vesting legislation. Four states have statutory regimes that have replaced or supplemented the common law, in an attempt to avoid the injustice often associated with the application of principles of property and trust law to disputes between domestic partners. However, the statutory regimes vary considerably. For example, legislation in the Australian Capital Territory allows for property settlements between people who have lived together in a relationship of care. New South Wales, which followed the recommendations of the New South Wales Law Reform Commission in 1983, has conferred broad powers on the court to adjust the financial relationship between de facto partners. By contrast, the Victorian legislation applies only to real property. The Northern Territory has a statutory regime similar to that provided by New South Wales. In late 1995, in Western Australia a draft De Facto Relationships (Property) Bill was being developed, for possible introduction into Parliament in 1996.

1177. The report of the Joint Select Committee on the Operation and Interpretation of Certain Aspects of the Family Law Act 1975 referred to a number of submissions that argued for a single set of laws to apply uniformly to de facto partners throughout Australia. In the absence of uniformity, injustice will result in some cases, brought about by the fortuitous circumstance that the partners have moved from one state to another, where the law provides less protection in the event of breakdown of the relationship.

1178. The Federal Government lacks the necessary constitutional power to enact legislation to deal with de facto relationships. That power can only come from a referral of power by a state or states to the Federal Government. Should such a referral of power be made, this would enable the Federal Government to legislate for property settlements arising from the breakdown of a de facto relationship and for those proceedings to be dealt with in the Family Court of Australia. The Queensland Government is the only state government to date to have indicated that it will refer power to the Federal Government and is currently in the process of legislating to that effect.

Health services

1179. The Australian national health insurance scheme, Medicare, is aimed at ensuring that health care is within the reach of all families when they need it. Medicare provides this guarantee to Australians in a number of ways. It ensures that people contribute to the costs of the nation's health care according to their capacity to pay. Federal funding, together with the share of state funding derived from the Federal Government's financial assistance grants to states, comes from general taxation revenue and a compulsory Medicare levy. Both these income raising mechanisms are progressive and ensure that higher income earners contribute more than lower income earners.

1180. Agreements between the Federal Government and the states ensure that all Australians have the option of hospital care without charge as public patients. For medical care provided out of hospital by the patient's doctor of choice, Medicare offers rebates against a schedule of fees for a comprehensive range of consultations, operations and diagnostic tests performed by medical practitioners. In addition, it enables doctors to "bulk bill" so that patients pay nothing out of their pockets and the doctors accept the rebates as full recompense for the services provided.

1181. For necessary drug treatments, Medicare, through its Pharmaceutical Benefits Scheme, subsidizes a large range of pharmaceutical products following prescription by medical practitioners.

1182. Safety nets further protect families from out of pocket medical costs. Patient payments above a certain level per annum (not including above-schedule-fee charging by doctors) are fully subsidized by Medicare in that year. Medicare provides grants for other high need health-care services on a targeted basis. Examples include: women's health services such as cervical and breast cancer screening and birthing services; dental care for low-income and disadvantaged people; high technology health care such as magnetic resonance imaging, radiation oncology and organ transplantation; flying doctor and blood product services; activities to prevent such diseases as HIV/AIDS; childhood immunization and health promotion activities such as anti-drug abuse; and the National Rural Health Strategy, which aims to improve the health of rural Australians.

1183. Medicare does not extend to Norfolk Island, which has an island-wide health-care scheme. Each adult (except social security recipients or other exempt persons) pays an annual health-care levy, currently $260. This entitles the scheme member to free hospital and surgical care after a threshold of $3,000 expended in one year (either per individual or for a family unit). There is no upper limit to health-care benefits. However, restrictions apply to treatments on the mainland or overseas.

## Social security and welfare

1184. The Australian social security system provides a wide range of pensions, benefits and allowances. Some are directed specifically to families. Others, although available more broadly, also assist families and are paid to families at higher rates.

1185. Basic pension, allowance and benefit payments are taxable. However, special tax rebates are available to ensure that allowees with no other taxable income, and pensioners with insufficient other taxable income to reduce their level of pension, in fact pay no tax. In general, additional allowances are not taxable.

1186. Norfolk Island is not covered by the Australian system but maintains its own social security system under the Social Services Act 1980 (Norfolk Island). The rate of social services benefits payable in Norfolk Island is generally around 80 per cent of benefits payable in Australia.

### Basic Family Payment

1187. The Basic Family Payment is payable to parents or guardians in respect of the great majority of children under 16 years. An income and assets test applies. The income limit for receipt of the Basic Family Payment is relatively high and thus disallows only a small proportion of families.

1188. The Basic Family Payment is payable for a child until the end of the year in which the child turns 18 or ceases secondary studies, whichever occurs first, unless the student is receiving an allowance under a prescribed educational scheme. To be eligible the claimant must be a resident of Australia and the child must be either a resident of Australia or a dependent child of a resident of Australia and living with that person.

1189. Incorporated into the Basic Family Payment is an additional amount payable in cases of multiple births (three children or more) which is available until the multiple birth children reach six years of age. Further additional amounts are payable as an add-on to the basic rate of family payment to low-income working families, those receiving income support and those who are renting in the private market. Sole parents who receive an additional family payment are also paid a guardian allowance as part of that payment.

## Parenting Allowance

1190. From 1 July 1995 the Parenting Allowance became available through the social security system. This payment builds upon the previous Home Child Care Allowance and is payable to the member of a couple with primary responsibility for the care of a dependent child under 16 years. The Parenting Allowance recognizes the contribution to society and the family of those who care for children. Importantly, it provides an independent source of income for the partner caring for children and some financial recognition of the valuable work of the carer. Parenting Allowance provides increased choice for parents balancing work and family responsibilities. It also assists some families where one partner is unable to work because of the care being provided to a child who has a disability.

1191. The maximum rate of the Parenting Allowance is equivalent to unemployment payments and subject to income and assets tests. However, a non-taxable component, equivalent to the Home Child Care Allowance rate, is available to families irrespective of the income of the main earner in the family. Only the Parenting Allowance recipient's personal income can reduce this base payment.

## Income support

1192. Rates of income support until 1994 were higher for couples than for single people. However, in September 1994 a new allowance, the Partner Allowance, was introduced. Partner Allowance will be paid directly to the dependent partner instead of the additional amount of allowance currently paid to recipients of job search allowance, newstart allowance, sickness allowance and special benefit if the recipient has a dependent partner.

## Article 24

1193. All Australian jurisdictions recognize the special needs of children for care and protection, particularly where that care or protection is not able to be provided by families. There are legislative measures and programmes designed specifically to protect children and to provide assistance for children at risk. Laws concerning the care and protection of children are matters for which both the federal and state governments have responsibility.

1194. Australia is a party to the Convention on the Rights of the Child and submitted its initial report under article 44.1 (a) of the Convention in December 1995. Further commentary in relation to the issues presented below may be found in that report.

Definition of the child

1195. Detailed information on the definition of a child for the purposes of matters such as marriage, criminal responsibility, sexual consent and employment is provided in section B of Australia's first report under the Convention on the Rights of the Child.

Employment

1196. In Australia, the wages and working conditions of persons below adult age are regulated by a combination of legislation and awards. Although there is no general prohibition on employment of children before or after school hours, at weekends or during school holidays, some restrictions do exist. Legislation (essentially state legislation) deals with occupational health and safety matters and with minimum school leaving ages, restrictions on child employment and employment of children in particular work. There is also no general legislation to govern the type of employment or hours of employment undertaken by young persons at school leaving age (generally 15 years). Further information relating to state legislation which regulates the employment of children appears in section H (c) of Australia's initial report under the Convention on the Rights of the Child.

1197. In relation to enlistment in the Australian armed forces, the minimum age for voluntary enlistment is as follows:

| | |
|---|---|
| Navy: | 16 years |
| Army: | 17 years |
| Air Force: | 17 years |

1198. Australia participates in the United Nations Working Group charged with the elaboration of a protocol on the involvement of children in armed conflict. Personnel in the Australian armed forces under the age of 18 years are not normally deployed to areas which would result in their direct involvement in armed conflict. In the light of the development of the protocol, the issue of recruitment of volunteers under 18 years and the direct participation of persons under 18 years in hostilities is under active consideration by the Australian Government.

Education

1199. Primary and secondary education for children aged between 6 and 15 years (with the exceptions of South Australia where the minimum age is 5 years and Tasmania where the maximum is 16 years) is compulsory and is primarily the responsibility of the state governments. Children are required to attend either a government school or an educational institution approved by the appropriate department of education or educational authority. Tuition at primary and secondary government schools is free. Exceptions to attendance at school include where the child or parent is ill, the child is satisfactorily educated at home, or where special psychiatric treatment is required and it is deemed to be in the best interests of the child to be exempt from school attendance.

1200. Federal and state legislation and education programmes are discussed in more detail in section G of Australia's initial report under the Convention on the Rights of the Child.

Non-discrimination

1201. As discussed further below under article 26, the Federal Government and state governments have enacted anti-discrimination legislation. Apart from Victoria, the legislation now also covers discrimination on the ground of age.

1202. Children enjoy the same rights to make complaints of discrimination under Australian legislation as do adults. In practice, adults, such as parents or guardians, often make complaints on behalf of children. Although there has been no specific study into the extent to which children use discrimination legislation, a range of complaints of discrimination on the ground of disability in the areas of education and the provision of services have been made. Further detailed information is provided in paragraphs 170 to 198 of Australia's first report under the Convention on the Rights of the Child.

1203. In relation to the rights of ex-nuptial children, all jurisdictions except Western Australia have legislation which is designed to remove the legal consequences of illegitimacy which formerly disadvantaged children not born within a marriage. In Western Australia, various statutes have been amended to abolish the principal disadvantages of illegitimacy, for example, in regard to intestate estates, dispositions by will, conveyances and testator's family maintenance. The Federal Family Law Act 1975 covers both children of marriages and ex-nuptial children in relation to guardianship, custody and access and maintenance (except in Western Australia where ex-nuptial children are dealt with under state law).

1204. The position in regard to children, and parents of children, born as a result of artificial insemination by donor or in vitro fertilization procedures is discussed further under Right to found a family, article 23, above.

Child welfare

1205. The key principle in most legislation concerning children in federal and state jurisdictions is the best interests of the child.

### Family Law

1206. In relation to family law, it is generally accepted that the family has prime responsibility for the care and protection of children and children are usually only separated from their parents where abuse or neglect may be involved. The Family Court has jurisdiction in respect of the welfare of children following the 1983 amendments of the Family Law Act 1975. Under the Federal Family Law Reform Act 1995, which was passed by the Parliament on 21 November 1995, the best interests of the child are to be the paramount consideration. This is consistent with the terminology used in the Convention on the Rights of the Child, which Australia ratified in 1990.

1207. Further detailed information on the operation of the Family Law Act is provided in paragraph 208 of Australia's first report under the Convention on the Rights of the Child.

### Children deprived of a family environment

1208. State and federal governments have a range of services and legislation which provide for children deprived of a family environment. Further detailed information is provided in section E of Australia's first report under the Convention on the Rights of the Child.

### Child safety

1209. Consumer protection legislation in Australia also extends to the physical well-being of children. Further detailed information is provided in paragraphs 743 to 748 of Australia's first report under the Convention on the Rights of the Child.

### Work and family

1210. Maternity and paternity leave provisions are discussed above in relation to article 3. The following section deals first with work-based assistance to workers with family responsibilities, then with child care and finally with the maintenance of children of divorced parents.

### ILO Convention No. 156

1211. Australia ratified ILO Convention No. 156 in March 1990. A strategy to give practical effect to the Convention by creating a climate of opinion conducive to addressing the needs of workers with family responsibilities was launched on 11 February 1993. Its objectives cover the following broad subject areas: discrimination, terms and conditions of employment, labour force access and participation, community services and planning, and vocational education and training.

1212. The Sex Discrimination Act 1984 prohibits employees from being dismissed on the ground of family responsibilities. Family responsibilities are defined as the responsibilities of an employee to care for, or support, a dependent child of the employee or any other immediate family member who is in need of care and support. The Industrial Relations Act 1988 also prohibits termination of employment on the grounds of family responsibilities. See also under article 3, Maternity and paternity leave, above.

## Maintenance of children

1213. Maintenance for children is provided for by provisions of the Federal Family Law Act 1975 and applies in all states except Western Australia, which has compatible legislation. The object of the Act relating to the maintenance of children is that children should have their proper needs met from reasonable and adequate shares in the income, earning capacity, property and financial resources of both of their parents (including step-parents) and that the parents should share equitably in the support of their children. The legislation is directed towards ensuring the provision of adequate levels of maintenance for children.

1214. The Child Support Scheme was introduced by the Federal Government and is directed towards ensuring, as far as practicable, that children of separated parents continue to receive financial support from both of their parents in accordance with the parents' financial capacities. It is based on the principle that parents have the primary duty to maintain their children. Detailed information on the Child Support Scheme and the recovery of maintenance for children is provided in section E of Australia's first report under the Convention on the Rights of the Child.

## Child care

1215. The federal Children's Services Program aims to assist families with dependent children to participate in the workforce and the general community, by ensuring that child care is affordable for low- and middle-income families, by improving the supply and quality of child care and by encouraging innovative services, such as family aide or homemaker services, family or financial counselling services, parliamentary educational services and support. Table 22 shows trends in the use of formal and informal child care. Further detailed information is provided in paragraphs 1017 to 1025 of Australia's first report under the Convention on the Rights of the Child.

### Health and nutrition

1216. Generally, the quality of health care for children in Australia is high, although children living in remote and isolated areas, especially those from Aboriginal and Torres Strait Islander backgrounds, fare less well than children living in large population areas. Further detailed information is provided in section F of Australia's first report under the Convention on the Rights of the Child.

### Asylum-seeker children

1217. The Migration Act 1958 authorizes the arrest and detention of unlawful non-citizens. An unlawful non-citizen may be a person who holds a visa which has expired or a person who has arrived in Australia without authority to enter. Since November 1989, a total of 1,928 unauthorized persons, including 502 children, have arrived in Australia by boat and 62 children have been born to them in Australia. Of these, 876 have departed Australia to return to their home country or travel to another country; 446 have been approved to remain here; 593 are in detention awaiting decisions on applications or appeals, the outcome of litigation or removal from Australia. Of those in detention, 206 are children.

1218. Wherever possible, children are not taken into custody. The Migration Regulations made under the Migration Act provide that the Minister may grant a visa to a non-citizen minor where the best interests of the child are best protected by the release of that minor to the care of an Australian citizen, Australian permanent resident or New Zealand citizen. Since 1 September 1994 this has been the case even where the application for a protection visa has been refused and the decision is subject to judicial review.

1219. On occasions, the detention of minors cannot be avoided, for example, where a child's parent or guardian must be kept in custody and it is not feasible to make suitable alternative arrangements for the care of the child. Every effort is made to ensure that the period of detention for minors is kept to a minimum. Persons who are in detention have access to educational, health and welfare services. An education programme covering aspects of pre-primary and primary education is in place for children at the two centres for long-term detention of unauthorized boat arrivals. Recreation facilities at these centres include gardening, ball sports, sewing, television and video, and some gymnasium equipment. Further detailed information on the situation of asylum-seeker children and unaccompanied minors is provided in section H (a) (i) of Australia's first report under the Convention on the Rights of the Child.

### Child abuse

1220. All Australian jurisdictions recognize the special needs of children for care and protection, particularly where that care or protection cannot be provided by families. There are legislation and programmes designed specifically to protect children and to provide assistance for children at risk. Some jurisdictions also have specific legislation to prohibit the making of pornography involving children. Detailed information is provided in sections E and H (c) of Australia's first report under the Convention on the Rights of the Child.

### Drug abuse

1221. There are a number of federal and state initiatives aimed at the reduction of drug abuse by children. Further information relating to federal and state drug abuse prevention initiatives and legislation appears under section H (c) of Australia's first report under the Convention on the Rights of the Child.

### Registration of births

1222. Matters relating to the registration of births in Australia are governed by state legislation. All states require the registration of births, but the time within which this must be done varies amongst Australian jurisdictions. In Queensland, South Australia, Tasmania, Victoria, Western Australia and the Northern Territory, registration is required within two months. In New South Wales, the relevant time is one month. In the Australian Capital Territory, the relevant time is 28 days.

Name

1223. All states require the child's name as part of the particulars to.be furnished for registration of a birth. In South Australia, Queensland, Tasmania, the Australian Capital Territory, the Northern Territory, Western Australia and Norfolk Island there is no requirement that a first name be entered into the register at the time of registration. This may be added to the register at a later date. Provision also exists in most Australian jurisdictions for changes to occur in the registered name of a child in appropriate circumstances. Common law (to the extent that this has not been replaced by statute) also permits a change of name to occur by reputation and repute. In Western Australia, the Child Welfare Act 1947 enables the Director-General of Community Development to give the child a name.

1224. Recent Australian practice has been to move away from default registration of a child in the name of the father. The following two cases illustrate this fact. In the New South Wales Registry, the practice had existed of registering the surname of a child as that of the father in the case of parents married to each other with different surnames. This was the practice regardless of whether the mother consented. A recent decision of the New South Wales Equal Opportunity Tribunal in Ms. L. v. Registrar of Births, Deaths and Marriages, however, found this practice was a service to which the Anti-Discrimination Act 1977 applied and that it discriminated against the mother on the grounds of sex and marital status. The Tribunal observed that registration of the child's name in the event of disagreement between the parents could be resolved by the registration of the application received first.

1225. Secondly, in a case in the Family Court (unreported, 18 August 1993), Warwick J. considered the use of hyphenated surnames to be an appropriate remedy in relation to a dispute as to which surname was to be used by a child of a failed marriage. In that case, when the child was born he was given the name of the person regarded as his father, pursuant to the relevant Queensland legislation. The judge considered that merely because the wife herself had adopted her husband's surname while cohabiting with him did not mean she was a party to the registration of the child under that surname. He found that:

> "The real questions are as to the degree of identification of the child with a registered surname, and as to the difficulties or embarrassment for the child, if using a surname other than that by which he or she is registered."

1226. In Australia, citizenship is a federal government responsibility, whereas registration of births is governed by state legislation.

## Nationality

1227. Children born in Australia before 20 August 1986 generally acquired Australian citizenship by virtue of birth in Australia. Children born in Australia on or after 20 August 1986 acquire Australian citizenship by virtue of birth in Australia if:

> At least one parent of the child was either an Australian citizen or a permanent resident at the time of the child's birth; or
>
> The child has been ordinarily resident in Australia throughout the period of 10 years commencing on the day on which the child was born.

1228. The Australian Citizenship Act 1948 was amended in 1986 to allow for the acquisition of Australian citizenship by children born in Australia who do not acquire any citizenship by birth and who would otherwise be stateless. A person acquires citizenship if the Minister for Immigration and Ethnic Affairs is satisfied that the person was born in Australia; is not, and has never been, a citizen of any country; and is not, and has never been, entitled to acquire the citizenship of a foreign country.

1229. Children born overseas of an Australian citizen parent can acquire Australian citizenship by descent through registration for citizenship. The Australian Citizenship Act 1948 also empowers the Minister for Immigration and Ethnic Affairs to grant citizenship to children and enables children under the age of 16 years to be included in a certificate of Australian citizenship granted to their responsible parent.

## Article 25

### Participation in public affairs

1230. Australian citizens can take part in public affairs by various means. As discussed above in relation to article 22 Australian law does not impose any restrictions on the free formation of political associations, including political parties. Qualification for electoral office is discussed below. However, the principal means is by voting at periodic elections to choose representatives to the federal or state parliament and local government (see below, Parliamentary elections).

1231. Citizens may also seek appointment to various non-elected public offices, depending, of course, on whether they meet eligibility requirements for these offices. Vacancies in a number of public offices are advertised in the national press and, for others, appointments may be made without advertisement of vacancies, for example, appointments to judicial offices.

1232. Citizens and non-citizens alike may also present petitions to Parliament. Particularly in recent times, the growth in numbers of professional lobbyists and lobby groups has provided another means for interested individuals and groups to make their views known to governments. From time to time, government organizations seek the views and comment of community organizations and individuals in public policy formulation. This may be in writing or it may take place in more formal inquiries by the presentation of information in person. Citizens may also be appointed to various government boards and committees, either as individuals or as representatives of consumer or other interests.

1233. As mentioned in the core document and under articles 3 and 26 in the present report, the Federal Sex Discrimination Act 1984 covers discrimination in the administration of federal laws and programmes. The Federal Racial Discrimination Act 1975 and the Disability Discrimination Act 1992 also make discrimination unlawful in specified areas. Anti-discrimination legislation and anti-discrimination provisions in legislation dealing with civil service employment are itemized below.

## Aboriginal and Torres Strait Islander affairs

1234. Given the geographic and economic disadvantage faced by members of the Aboriginal and Torres Strait Islander community, the Aboriginal and Torres Strait Islander Electoral Information Service of the Australian Electoral Commission (see section below) utilizes special teaching programmes and community networking to ensure that Aboriginal and Torres Strait Islander peoples are able to fulfil their duties and exercise their right to vote as Australian citizens.

1235. Furthermore, in addition to the federal, state and local government elections, Aboriginal and Torres Strait Islander peoples are also eligible to vote in the Aboriginal and Torres Strait Islander Commission (ATSIC) elections. Section 104 of the Aboriginal and Torres Strait Islander Commission Act 1989 provides that regional council elections shall be held every three years. The first round of regional council elections were held on 3 November 1990, consequently 1993 was a regional council election year. The regional council elections were held on 4 December 1993.

1236. Section 100 of the Act provides that regional council elections shall be conducted by the Australian Electoral Commission. Table 23 shows the number of Aboriginal and Torres Strait Islander peoples who voted in the last federal and ATSIC elections.

1237. The elected members of the regional councils then in turn elected 17 zone commissioners to the Aboriginal and Torres Strait Islander Commission. These 17 commissioners, together with two commissioners appointed by the Minister for Aboriginal and Torres Strait Islander Affairs, form the Commission. The regional councils are responsible for allocating funds to local programmes within ATSIC guidelines and helping to draw up and carry out regional plans for improving the economic, social and cultural life of their communities.

## Women and public affairs

1238. While women remain underrepresented in senior positions, the proportion of women in decision-making positions in the Australian Public Service has continued to improve since 1980. Women's participation in the Senior Executive Service (SES) (i.e. at senior management level) in the Australian Public Service has increased from 4 per cent in 1984 to 18 per cent in

August 1995. At June 1995, 81.6 per cent of women SES officers were in the lowest band of SES ranking compared to 71.8 per cent of male SES officers.

1239. Women also remain underrepresented in Australian parliaments. In 1995, 16 per cent of all federal and state parliamentarians were women. Twenty-two per cent of members of federal and state upper houses of parliament were women, compared to 14 per cent in lower houses.

1240. Women have headed governments in recent years in three states/territories: the Australian Capital Territory currently has a woman Chief Minister.

1241. Women's representation in elected local government positions is higher than their representation in federal or state parliaments. In June 1992, 20 per cent of local council members were women, compared with 13 per cent in 1986. In 1992 women comprised 19.5 per cent of elected members of local government, compared to 80.5 per cent of men. The ratio of men to women in local government is similar to that in the Aboriginal and Torres Strait Islander Commission (ATSIC) referred to in the previous section. In the most recent elections associated with ATSIC, women were targeted through a gender specific strategy to enrol, nominate and vote.

1242. In October 1994, a discussion paper, "Women and parliaments in Australia and New Zealand", was issued by the Commonwealth-State Ministers' Conference on the Status of Women and efforts are being made by the major political parties to encourage the participation of women in politics.

Australian Electoral Commission

1243. The Australian Electoral Commission, established on 21 February 1984, is responsible for federal electoral and referendum administration. One of the Commission's primary functions is to promote public awareness of electoral and parliamentary matters, for example, by conducting education and information programmes. Other functions include:

> Maintaining federal electoral rolls and enforcing the law on compulsory enrolment;
>
> Conducting elections for Senators and Members of the House of Representatives, referendums on proposed laws to alter the Australian Constitution, and enforcing the law on compulsory voting;
>
> Providing information and advice on electoral matters to the Parliament, federal government departments and authorities;
>
> Conducting and promoting research into electoral matters;
>
> Publishing material on matters that relate to its function;
>
> Conducting elections for officials of trade unions and other industrial organizations registered under the provisions of the Industrial Relations Act 1988;

Considering and reporting to the Minister on electoral matters referred to it by the Minister and such other electoral matters as the Commission thinks fit; and

Providing assistance in matters relating to elections and referendums to authorities of foreign countries or to international organizations.

## The Fitzgerald Report

1244. In July 1989, Mr. Tony Fitzgerald QC submitted his report on the Commission of Inquiry into Possible Illegal Activities and Associated Police Misconduct (the Fitzgerald Report) in Queensland. As a preventive measure, the Fitzgerald Report recommended the creation of two independent commissions - the Criminal Justice Commission and the Electoral and Administrative Review Commission - to oversee official conduct and law reform. The Queensland Government implemented this recommendation in 1989.

1245. The Electoral and Administrative Review Commission was established by the Electoral and Administrative Review Act 1989 to provide an independent and comprehensive review of administrative and electoral laws. Specifically the Commission was empowered to provide reports to the Queensland Parliament and the Premier with a view to achieving and maintaining:

- Efficiency in the operation of the Parliament; and

Honesty, impartiality and efficiency in:

  Elections;

  Public administration of the State; and

  Local authority administration.

1246. The Electoral and Administrative Review Commission was concerned only with systems, principles and practices, and not with particular instances of alleged inefficiency, dishonesty or impartiality.

1247. The work of the Commission was completed in August 1993 with the release of its report entitled "Review of the preservation and enhancement of the individual's rights and freedoms".

## Parliamentary elections

### The right to vote

1248. It is an essential requirement of any democratic system that, as far as possible, all those who are eligible to vote are able to do so. The Australian federal system is composed of two main levels of government - federal and state. In addition, there is government at the local level, which operates under legislation enacted by the state. At each level, governments are elected in periodic elections held by secret ballot and within legislatively determined time limits.

1249. For federal and state elections, the general rule is that enrolment and voting are compulsory for all eligible Australian citizens. There are three basic qualifying conditions for eligibility to vote in elections to the federal and state parliaments: age, nationality and residence. Generally, all Australian citizens who are normally resident in a relevant electoral division and who are at least 18 years of age are both entitled and obliged to enrol and to vote.

1250. Special enrolment provisions are available for Members of Parliament, overseas electors, itinerant electors, 17 year olds, persons stationed in the Antarctic, Norfolk Islanders (see further commentary under article 1) and silent enrolment voters (voters who do not want their addresses to appear on the electoral roll). At the federal level and in some states there is an exemption from compulsory voting for those people whose religious convictions would preclude them from so doing.

Periodic elections

1251. These are provided for by legislation in each Australian jurisdiction for each type of election, as are elections by secret ballot. The periods within which elections for either house of a legislature must be held vary from every three to every six years. The lower house of the Federal Parliament (the House of Representatives), and the Parliaments of Queensland and the Australian Capital Territory are elected for three years. The upper house of the Federal Parliament (the Senate) is elected for six years with rotating half-Senate elections every three years except in the case of a double dissolution. The Parliaments of New South Wales, Victoria, Western Australia, South Australia, Tasmania and the Northern Territory are elected for four years. The free expression of the will of the electors is also protected by detailed provisions in the legislation of all jurisdictions for election polling, scrutineering and procedures. Offences are defined for abuse of the system - particularly for breaches or neglect of official duty, bribery and undue influence.

Local government elections

1252. Local Government Acts (enacted by state parliaments) provide for periodic elections and the voting rights of electors. The electoral schemes vary in the different jurisdictions. For example, in South Australia all residents are entitled to vote in local government elections irrespective of whether or not they are Australian citizens. In such elections persons eligible to vote are also eligible to stand for election. In a large number of jurisdictions voting is compulsory and has the same eligibility requirements as the relevant state.

Candidates for election

1253. There are a number of major and minor political parties operating at federal and state levels and at the local government level. Voters are able to choose between different candidates or different programmes (often these are programmes of particular political parties). The formation of political parties is discussed above in relation to article 22.

1254. Election to any Australian parliament does not depend on membership of a particular party. There are however, certain prerequisites for membership. In relation to the Federal Parliament, section 44 of the Constitution disqualifies from membership a person who:

> Is under any acknowledgment of allegiance, obedience or adherence to a foreign power, or is a subject or a citizen or entitled to the rights or privileges of a subject or a citizen of a foreign power; or
>
> Is attainted of treason, or has been convicted and is under sentence, or subject to be sentenced, for any offence punishable under federal or state law by imprisonment for one year or longer; or
>
> Is an undischarged bankrupt or insolvent; or
>
> Has any direct or indirect pecuniary interest in any agreement with the Federal Public Service otherwise than as a member and in common with the other members of an incorporated company consisting of more than 25 persons (subject to some exceptions); or
>
> Holds any office of profit under the Crown, or any pension payable during the pleasure of the Crown out of any federal revenues.

1255. In relation to the requirement for a public servant to resign if he or she intends to stand for election, sections 47C and 82B of the Public Service Act 1922 provide that a public servant who has resigned in order to contest a federal or state parliamentary election, but fails to be elected, may apply to be re-appointed or re-employed.

1256. The consequences of non-resignation of a public servant were discussed by the High Court in Sykes v. Australian Electoral Commission ((1993) 115 ALR 645). In that case, it was held that section 44 of the Australian Constitution had been breached when a public servant failed to resign from the Victorian Public Service (from which he had been granted leave of absence) before nominating for a seat in the House of Representatives in the Australian Parliament. As a result his election was void.

1257. Public servants who are intending to stand for election to a state parliament, the Northern Territory Legislative Assembly or the Australian Capital Territory Legislative Assembly may be required to resign from the public service depending on state legislative requirements. Resignation from the public service is not required if election to a local government body is sought.

1258. In Norfolk Island, a person who has been convicted and sentenced to a term of imprisonment of one year or more or who is an undischarged bankrupt is disqualified from membership of the Norfolk Island Legislative Assembly.

1259. A member of one house of parliament cannot stand for election to another house while retaining membership of the first house.

Disqualification of voters

1260. Section 93 of the Federal Electoral Act 1918 provides that the following persons are disqualified from enrolment and voting in federal elections: persons of unsound mind; persons who are under sentence for an offence with a maximum penalty of imprisonment for five years or longer; persons convicted of treason or treachery and not pardoned; holders of temporary visas; and unlawful non-citizens.

1261. A recommendation to extend voting rights to all prisoners was forwarded by the Joint Standing Committee on Election Matters in its report on the 1993 federal election. This recommendation was founded in part on advice from the Australian Electoral Commission that the current system created administrative difficulties. However, the Government recently announced that while it would not proceed with the recommendation it would look at ways of streamlining current arrangements.

1262. State legislation governs disqualification from voting in state elections. The current arrangements for the voting rights of prisoners are as follows:

> In New South Wales a person who is imprisoned for a term of 12 months or more is disqualified.
>
> Currently, all prisoners can enrol and vote in the Northern Territory. However, new legislation will bring the Northern Territory into line with federal arrangements.
>
> Queensland and the Australian Capital Territory have the same arrangements as those provided federally.
>
> In South Australia all prisoners are entitled to vote.
>
> In Tasmania any imprisoned person is disqualified from voting.
>
> In Victoria a person who is imprisoned for a term of five years or more is disqualified from voting.
>
> In Western Australia a person who is imprisoned for 12 months or more is disqualified.

Special voting arrangements

1263. In all jurisdictions, citizens who are unable to attend a polling booth on polling day may make special arrangements by applying for a postal or pre-poll vote. In relation to federal elections, postal and/or pre-poll voting facilities are available to any elector who:

> Will not be, throughout the hours of polling on polling day, within the state or territory for which he or she is enrolled;

Will not be, throughout the hours of polling day, within 8 kilometres by the nearest practicable route of any polling booth open in the state or territory for which he or she is enrolled for the purpose of an election;

Will be, throughout the hours of polling on polling day, travelling under conditions which will preclude the person from voting at any polling booth in the state or territory for which he or she is enrolled;

Is seriously ill or infirm, and by reason of such illness or infirmity will be precluded from attending at any polling booth to vote, or, in the case of a woman, will, by approaching maternity, be precluded from attending at any polling booth to vote;

Is, at a place other than a hospital, caring for a person who is seriously ill or infirm or approaching maternity and by reason of caring for the person will be precluded from attending at any polling booth to vote;

Will be, throughout the hours of polling on polling day, a patient in a hospital and be unable to vote at that hospital on that day, or have his or her vote taken by a mobile polling team prior to polling day;

Is, by reason of his or her membership of a religious order or by religious beliefs:

> Precluded from attending a polling booth; or
>
> Precluded from voting throughout the hours of polling on polling day or throughout the greater part of those hours;

Is:

> Serving a sentence of imprisonment; or
>
> Otherwise in lawful custody or detention;

Is a silent elector; or

Is engaged in employment throughout polling day and is unable to attend a polling booth to vote.

1264. Mobile polling teams also enable voters whose movement is restricted to exercise their right to vote. Mobile polling teams visit prisons, some nursing homes, hospitals and remote areas of the country. Absent voting is also available on polling day for those people outside the division but within the state for which they are enrolled.

1265. To facilitate citizens from another country to exercise their right to vote, embassies and high commissions may arrange for their citizens in Australia to vote in an election held in that country. Similarly, Australian embassies may provide facilities for Australian citizens abroad to participate in federal and state elections.

Electorates

1266. Australia accepts the general concept of universal and equal suffrage. Australia's first report (paras. 420-422) referred to the fact that some rural electorates contained smaller numbers of persons than some urban electorates and the following declaration was included in Australia's instrument of ratification:

> "The reference in paragraph (b) of article 25 to 'universal and equal suffrage' is accepted without prejudice to laws which provide that factors such as regional interests may be taken into account in defining electoral division."

1267. This declaration was withdrawn in 1984 and progress has been made towards a greater degree of equality in voting value, as measured by the size of electorates.

1268. Section 24 of the Australian Constitution provides that the number of members of the house of representatives chosen in each of the states shall be in proportion to the respective numbers of their people.

1269. Section 7 of the Constitution requires equal representation in the senate of each of the existing states, regardless of population. The Commonwealth Electoral Act 1918 contains provisions designed to ensure that (within each state or territory) electoral divisions for the Federal House of Representatives will be approximately equal in enrolment.

1270. The basis for each electoral redistribution is a quota of electors, determined by dividing the total enrolment of the state by the number of members of the house of representatives to be chosen therein. A redistribution may not create divisions which deviate from the relevant enrolment quota by more than 10 per cent, and must endeavour to ensure that each division within each state will, three years and six months after the implementation of the redistribution, have plus or minus 2 per cent of the average divisional enrolment of that state. Subject to these paramount requirements, due consideration must be given, in relation to each electoral division, to:

> Community of interests within the electoral division, including economic, social and regional interests;
>
> Means of communication and travel within the electoral division;
>
> The trend of population changes within the state;

The physical features and area of the electoral division; and

The boundaries of existing divisions in the state.

1271. The timing of federal redistributions is determined according to a formula set out in the Commonwealth Electoral Act 1918 and is independent of political control. Redistributions must be held at least every seven years; whenever there occurs a level of malapportionment, specified as more than one third of the electoral divisions in a state deviating by more than 10 per cent from the state average for a period of more than two months; or whenever there is a change in the number of members of the house of representatives to be chosen in a state. Redistributions are conducted by an independent body chaired by a Federal Court judge and are not subject to any governmental or parliamentary veto. Extensive opportunities are accorded to members of the public to make suggestions and comments regarding possible boundaries and to mount objections to widely promulgated initial proposals.

1272. The principle that electorates should not vary by more than a set percentage from a standard number of electors in each electorate is also embodied in the legislation governing all state electoral systems (at least in relation to divisions for lower house elections). The margin is 5 per cent in New South Wales, 10 per cent in Tasmania, Victoria and Queensland (except in five districts in excess of 100,000 square kilometres where weightage equivalent to 2 per cent of district area is permitted), 15 per cent in Western Australia and 20 per cent in the Northern Territory.

1273. In Western Australia, variations in voting value arise because of a zoning system which distinguishes between metropolitan and non-metropolitan areas. At the end of 1993 the ratio between the largest number and the smallest number of voters enrolled in a district of the Legislative Assembly was approximately three to one. This inequality has been the subject of litigation in the High Court in which it has been argued that the Australian Constitution contains a general principle of electoral equality of voters in both federal and state elections.

1274. In Queensland, a statutory system of increasing the voting value of five rural electorates has led to a two to one inequality between the largest number and smallest number of voters enrolled in a district of the Queensland Parliament.

## Public service access

1275. Access to public service employment in Australia is available to all Australian citizens (and in some jurisdictions to non-citizens) equally. Permanent appointment to the Federal Public Service is open to Australian citizens under 65 years of age and appointments are made from eligible applicants using a system of open competition by merit. There may also be legislative requirements which need fulfilling, such as undertaking a medical examination, and for some positions, educational or professional qualifications are necessary. Confirmation of appointment is generally conditional on successful completion of a probationary period, usually of six months. The position is the same at state level, except that Australian citizenship is not usually a critical entry requirement.

1276. Some public service positions are Designated Security Assessment Positions which may require access to matters which are classified in the interests of national security or access to secure areas. Other positions are Positions of Trust where the occupant has custody of stores, equipment or public monies. A security clearance is required for placement in these positions and an assessment is performed by the Department and includes checks with the Australian Federal Police and the Australian Security Intelligence Organisation. Top secret, secret, confidential and restricted are the national security classifications. A person who receives an adverse or qualified security assessment in regard to his or her employment in the Federal Public Service has a right to have that assessment reviewed by the Security Appeals Tribunal, which is established under the Australian Security Intelligence Organisation Act 1979.

### Promotion

1277. Promotion within the Federal Public Service is based on assessment of relative efficiency. Vacant positions are usually advertised so that any officer of the Service may apply for promotion or transfer. Vacant positions are often open, but need not be open, to persons outside the public service. The guidelines for lateral recruitment into the non-executive level of the Federal Public Service, for example, provide that persons from outside the public service may be appointed where applications for the relevant position have been advertised outside the Service.

### Merit in staff selection

1278. The Public Service Act 1922 requires that people be appointed to the public service and promoted within the service on the basis of merit competition. Section 33 (1) of the Act provides that appointments are required to be made on the basis of an assessment of the relative suitability of the applicants. Section 50A (1) of the Act requires that Department secretaries select the most efficient person who has applied for a particular promotion. The Act requires that decisions relating to appointments, transfers and promotions be made without:

> Discrimination on the ground of political affiliation, race, colour, ethnic origin, social origin, religion, sex, sexual preference, marital status, pregnancy, age or physical or mental disability;
>
> Discrimination that is unlawful under the Racial Discrimination Act, the Sex Discrimination Act or the Disability Discrimination Act; or
>
> Any other unjustified discrimination (section 33 (3)).

1279. As discussed elsewhere in this report, legislation in force making discrimination unlawful in employment in the Federal Public Service includes:

> Public Service Act 1922;
>
> Racial Discrimination Act 1975;
>
> Sex Discrimination Act 1984;

Disability Discrimination Act 1992;

Human Rights and Equal Opportunity Commission Act 1986;

Affirmative Action (Equal Employment Opportunity for Women) Act 1986; and

Equal Employment Opportunity (Commonwealth Authorities) Act 1987.

1280. Except for promotions of officers to the more senior positions, promotions are subject to appeal on the ground of superior efficiency. The appeals are heard by promotion appeal committees which are established by the Merit Protection and Review Agency (MPRA) and are independent of the departmental selection processes. For promotions to the more senior positions, which are not subject to appeal, unsuccessful applicants have a right to seek review of the promotions by MPRA on one of two grounds: that there was a serious defect in the selection process or there was a breach of section 33 of the Public Service Act with regard to patronage, favouritism or discrimination. The Public Service Commissioner is responsible for approving selections to senior executive positions. The Public Service Commissioner is independent of the departmental selection process.

1281. The Public Service Act 1922 provides for disciplinary action to be taken if a public servant fails to fulfil his or her duty. A public servant fails to fulfil his or her duty if (among other things) he or she engages in patronage, favouritism or discrimination. Complaints of discrimination on these grounds may be dealt with by the Merit Protection and Review Agency or by the Human Rights and Equal Opportunity Commission.

1282. Section 22 B of the Public Service Act 1922 imposes on federal government departments and agencies an obligation to have equal employment opportunity programmes which ensure that women, people of non-English speaking backgrounds, people with disabilities and people of Aboriginal and Torres Strait Islander origin are given equal employment opportunities.

1283. In 1986 the Australian Defence Force (ADF) codified a policy on homosexuality (Defence Instruction 15-3) which stipulated that "when a member [of the ADF] admits to or is proven to be involved in homosexual conduct, consideration is to be given to the termination of that member's service". In December 1990, the Human Rights and Equal Opportunity Commission received a complaint from a member of ADF regarding discrimination on the basis of sexual preference. The Commission investigated the complaint and requested that ADF provide its reasons for its policy on homosexuality, having regard to Australia's international obligations concerning human rights and discrimination in employment and occupation. In addition to endeavouring to conciliate the individual complaint, the Commission initiated negotiations with the Department of Defence and ADF to resolve the issue at a policy level. The outcome of these negotiations was a commitment by ADF to develop, in consultation with the Commission, a non-discriminatory policy. In early 1992, after a series of negotiations which extended over a 12-month period, a new non-discriminatory policy on unacceptable sexual behaviour by members of ADF was agreed to and forwarded to the Minister for Defence Science and Personnel for approval. The Human Rights Commissioner determined that the

Commission should also exercise its power under section 31 of the Human Rights and Equal Opportunity Commission Act 1986 and formally report on this matter to the Attorney-General. The Commission's report was lodged with the Attorney-General on 25 September 1992 and subsequently, after further Cabinet discussion, the Prime Minister announced on 23 November 1992 the removal of the ADF ban on homosexuality. The Commission's report was tabled in Federal Parliament on 24 November 1992.

Equal employment opportunity

1284. The federal Public Service Commission has produced a plan entitled "Equal opportunity employment: a strategic plan for the Australian Public Service for the 1990". The objectives of the plan are:

> To eliminate unjustified discrimination against members of equal opportunity employment (EEO) groups in relation to all:
>
> > Selection for appointment, promotion, transfer or temporary transfer;
> >
> > Performance appraisal and performance pay;
> >
> > Training and staff development; and
> >
> > Terms and conditions of employment;
>
> To enable members of EEO groups to compete for promotion and transfer and pursue careers as effectively as other staff; and
>
> To increase or maintain the representation of EEO groups across all levels and structures of the public service on the basis of open competition on merit.

1285. In New South Wales, Queensland, Victoria, South Australia, Western Australia, Northern Territory and the Australian Capital Territory, state anti-discrimination legislation also covers discrimination in regard to appointments to, or employment in, the state public service. In South Australia, the Public Sector Management Act 1995 requires the principle of non-discrimination on the ground of sex, sexuality, marital status, pregnancy, race, physical impairment or any other ground to be observed in personnel management in the public sector. All selection decisions must be based on a proper assessment of merit. Under the Tasmanian State Service Act 1984, employment within the Tasmanian state service is based solely on the merit principle. All employment practices undertaken by the state government are on the basis of equal employment opportunity. In Queensland, the Equal Opportunity in Public Employment Act 1992 requires public sector agencies to develop equal opportunity management plans to promote equal opportunity for and eliminate discrimination against women, Aboriginal and Torres Strait Islander people, people from non-English speaking backgrounds and people with disabilities.

1286. In Norfolk Island, the Public Service Ordinance 1979 provides that the Public Service Board must have regard, inter alia, to maintaining the public service of Norfolk Island as a desirable source of employment for persons of ability and initiative. Administrative arrangements are in place to ensure employment in the public service is based on the merit principle and there is no discrimination on the grounds of sex, sexuality, marital status, race or pregnancy. In regard to persons with physical disabilities, provisions give the Public Service Board discretion to employ such persons with such modifications to their duties as circumstances may indicate are desirable.

## Article 26

### Federal legislation

1287. Discrimination is made unlawful under the Racial Discrimination Act 1975, the Sex Discrimination Act 1984 and the Disability Discrimination Act 1992 detailed below. There is a range of exceptions in the legislation and provision for special measures, that is, measures which are intended to promote the equality of groups.

1288. The Federal Government has also enacted the Human Rights and Equal Opportunity Act 1986, which empowers the Human Rights and Equal Opportunity Commission (HREOC) to inquire into any act or practice of the Federal Government which may be inconsistent with or contrary to any human right recognized under the Act.

1289. Complaints under each of the above pieces of legislation are investigated and conciliated by HREOC. If conciliation cannot be achieved under the Racial Discrimination Act 1975, the relevant commissioner can refer the complaint to the Commission for a public hearing. If the Commission finds the complaint substantiated, it will make an appropriate determination. Where parties do not comply with the determination, fresh proceedings must be instituted in the Federal Court, which has power to rehear the matter and enforce its determination. Regarding the powers and functions of HREOC, see further under article 2, federal legislation since previous report, above.

1290. Discrimination in relation to termination of employment is also proscribed under the Industrial Relations Act 1988 as amended in 1993. Subsection 170DF (1) of that Act prohibits dismissal on the following grounds:

> Temporary absence from work because of an illness or injury;
>
> Union membership or participation in union activities outside working hours or, with the employer's consent, during working hours;
>
> Non-membership of a union or of an association that has applied to be registered as a union under the provisions of the Industrial Relations Act 1988;
>
> Seeking office as, or acting or having acted in the capacity of, a representative of employees;

> The filing of a complaint, or participation in proceedings, against an employer involving alleged violation of laws or regulations or recourse to competent administrative authorities;
>
> Race, colour, sex, sexual preference, age, physical or mental disability, marital status, family responsibilities, pregnancy, religion, political opinion, national extraction or social origin;
>
> Absence from work during maternity leave or other parental leave.

1291. Subsection (2) provides a defence to a claim under subsection 170DF (1):

> "Subsection (1) does not prevent [race, colour, sex, sexual preference, age, physical or mental disability, marital status, family responsibilities, pregnancy, religion, political opinion, national extraction or social origin] from being a reason for terminating employment if the reason is based on the inherent requirements of the particular position."

1292. The breadth of the exception to subsection 170DF (1) based on the inherent requirements of the position was considered in an unreported 1995 judgement given by Chief Justice Wilcox in the Industrial Relations Court of Australia: see Christie v. Qantas Airways Ltd (incorporating Allman v. Australian Airlines Ltd). In that case, the Industrial Court decided that the word "inherent" is to be taken as referring to a requirement that is fundamental, intrinsic or essential to the position rather than something which is truly unnecessary although insisted on by a particular employer.

## Affirmative action and equal opportunity

1293. Equal employment opportunity legislation exists at the federal level in relation to both the public and private sectors. In the public sector, organizations in most jurisdictions are required to implement equal employment opportunity programmes for designated groups. These may include women, employees from non-English speaking backgrounds, people with disabilities and people of Aboriginal origin, depending on the jurisdiction. Public sector equal employment opportunity is discussed further in the present report in relation to article 25.

1294. In relation to the private sector, the relevant federal Act is the Affirmative Action (Equal Employment Opportunity for Women) Act 1986. Under the Act, all higher education institutions, private companies with more than 100 employees, group training schemes, trade unions, non-government schools and community groups are required to develop and implement affirmative action programmes for women and to submit annual reports of progress achieved.

1295. The Affirmative Action (Equal Employment Opportunity for Women) Act 1986 sets out a minimum of eight steps which are integral to an affirmative action programme. They are to:

> Issue a policy statement on affirmative action;

Appoint an affirmative action coordinator;

Consult with trade unions;

Consult with employees;

Conduct a statistical analysis of the workforce;

Review personnel policies and practices;

Set forward estimates and objectives; and

Monitor and evaluate the implementation of the programme.

## Special measures

1296. The equal opportunity legislation described above does not require action which is incompatible with the merit principle. It is recognized that where differential treatment has a positive rather than an invidious purpose, such treatment does not contravene the guarantee of equality enshrined in the phrase "equal protection of the law". Such measures may be required to redress past inequalities and to ensure future equality for historically subordinated groups.

1297. Most discrimination legislation in Australia has certain exceptions to the provisions prohibiting discrimination, where the discrimination results from the implementation of measures to achieve equality. This allows people, such as employers, to take positive steps to overcome the effects of past discrimination.

1298. At a federal level, the Racial Discrimination Act 1975 has an exception in relation to the application of special measures to advance certain racial or ethnic groups. The Sex Discrimination Act 1984 has a general exemption concerning measures intended to ensure that persons of a particular sex or marital status or persons who are pregnant have equal opportunities with other persons. The Disability Discrimination Act 1992 has an exemption in relation to an act which is reasonably intended to ensure that people who have a disability have equal opportunities with others. State anti-discrimination legislation also contains exceptions.

1299. Federal and state human rights and equal opportunity bodies monitor the operation of laws to ensure they do not have an unjustifiable discriminatory impact.

## Racial discrimination

1300. The Racial Discrimination Act 1975, Australia's first federal anti-discrimination statute, gives effect in part to Australia's obligations under the International Convention on the Elimination of All Forms of Racial Discrimination. Its major objectives are:

> To promote equality before the law of all persons regardless of their race, colour, or national or ethnic origin; and

> To make discrimination against people on the basis of their race, colour or national or ethnic origin unlawful.

1301. Section 9 of the Act prohibits direct and indirect discrimination on the grounds of race, colour, descent or national or ethnic origin which has the purpose or effect of nullifying or impairing the recognition, enjoyment or exercise, on an equal footing, of any human right or fundamental freedom in the political, economic, social, cultural or any other field of public life. Under the Act, employers are vicariously liable for the discriminatory acts of their agents or employees.

1302. The Racial Hatred Act 1995, which came into operation on 13 October 1995, created a civil prohibition against racial hatred by inserting new sections 18B to 18E into the Racial Discrimination Act 1975 to make it unlawful for a person to do an act, otherwise than in private, if;

> The act is reasonably likely in all circumstances to offend, insult, humiliate or intimidate another person or group of people; and
>
> The act is done because of the race, colour or national or ethnic origin of the other person or of some or all of the people in the group.

Sex discrimination

1303. The Sex Discrimination Act 1984 gives effect in part to Australia's obligations under the Convention on the Elimination of All Forms of Discrimination against Women and certain aspects of ILO Workers with Family Responsibilities Convention (No. 156). Its major objectives are:

> To promote equality between men and women;
>
> To eliminate discrimination on the basis of sex, marital status or pregnancy and, with respect to dismissals, family responsibilities; and
>
> To eliminate sexual harassment at work, in educational institutions, in the provision of goods and services; in the provision of accommodation and the delivery of Federal Government programmes.

1304. The Sex Discrimination Act 1984, as amended in December 1995, prohibits discrimination on the grounds of sex, marital status and pregnancy. Termination of employment on the basis of family responsibilities is also prohibited. Sexual harassment in various areas of public life is also unlawful under the Act. There are five permanent exemptions to the operation of the Act:

> Employment by an instrumentality of a state;
>
> Employment by educational institutions established for religious purposes;
>
> Discrimination by voluntary bodies in terms of provision of benefits or services to members and the admission of persons as members;

Acts done in accordance with an order of a court, a determination of the Human Rights and Equal Opportunity Commission or in accordance with a court or tribunal having power to fix minimum wages and other terms and conditions of employment; and

Exclusion from sporting activities in certain situations.

1305. The appropriateness of retaining, amending or removing these exemptions is a matter under consideration by the Federal Government.

## Disability discrimination

1306. The Disability Discrimination Act 1992 which commenced on 1 March 1993 has as its major objectives:

To eliminate discrimination against people with disabilities in specified areas;

To promote community acceptance of the principle that people with disabilities have the same fundamental rights as other members of the community; and

To ensure, as far as practicable, that persons with disabilities have the same rights to equality before the law as the rest of the community.

1307. The Act is discussed in further detail above in relation to article 2, under Disability legislation.

## Age discrimination

1308. Functions concerning Australia's responsibilities under the International Labour Organization Discrimination (Employment and Occupation) Convention 1958 (No. 111) are conferred on HREOC by the Human Rights and Equal Opportunity Act 1986. In 1989, the Federal Government passed regulations which gave domestic effect to ILO Convention No. 111 by specifying age as one of the grounds of discrimination within the Human Rights and Equal Opportunity Commission's functions relating to equal opportunity and treatment in employment and occupation under the Convention. The functions of the Commission include the investigation of complaints of discrimination on the ground of age in employment and occupation in the federal, state or private sectors.

1309. However, the Human Rights and Equal Opportunity Commission Act 1986 does not make it unlawful to discriminate on the ground of age and many complaints are not able to be conciliated, especially where the employer is bound to apply legislation which contains discriminatory provisions.

## State legislation

### Australian Capital Territory

1310. The Australian Capital Territory Discrimination Act 1991 prohibits discrimination on the grounds of sex, sexuality, transsexuality, marital status, status as a parent or carer, pregnancy, race, religious or political conviction, impairment, membership or non-membership of an association or organization of employers or employees, age, profession, trade, occupation or calling, association (whether as a relative or otherwise) with a person identified by reference to one of the above attributes, sexual harassment and racial vilification.

1311. The areas where discrimination is prohibited include employment, partnerships, professional or trade organizations, qualifying bodies, employment agencies, education, access to premises, goods, services and facilities, accommodation and clubs. The Act is administered and decisions made by the Discrimination Commissioner.

### New South Wales

1312. In New South Wales, the Anti-Discrimination Act 1977 makes discrimination unlawful on the grounds of race (including colour, nationality and ethnic or national origin), racial vilification, sex, pregnancy, marital status, disability, HIV/AIDS vilification, homosexuality, homosexual vilification, age and compulsory retirement. The criminal offence of serious racial vilification applies to public acts which involve threatening physical harm towards people or property.

1313. Under the Anti-Discrimination Act 1977, the areas where discrimination is prohibited include employment, partnerships, trade unions, qualifying bodies, employment agencies, education, access to places and vehicles, provision of goods and services, accommodation and registered clubs. The Act is administered by the President of the Anti-Discrimination Board and binding decisions are made by the Equal Opportunity Tribunal.

1314. In addition to the Anti-Discrimination Act 1977, there are miscellaneous provisions in other Acts that prohibit discriminatory behaviour in New South Wales. For example, the Industrial Relations Act 1991 prohibits an employer or an organization from victimizing a person because that person does not belong to an organization of employees or the person has refused to engage in industrial action.

### Northern Territory

1315. In the Northern Territory, the Anti-Discrimination Act 1992 prohibits discrimination on the grounds of race, sex, sexuality, sexual harassment, age, marital status, pregnancy, parenthood, breastfeeding, impairment (which covers physical, psychological, physiological and intellectual impairment), trade union or employer association activity, religious belief or activity, political opinion, affiliation or activity, irrelevant medical or criminal records and association with a person who has, or is believed to have, an attribute referred to in this section.

1316. The areas where discrimination is prohibited include education, work, accommodation, goods and services, facilities, clubs, insurance and superannuation.

1317. The legislation exempts discrimination where it is reasonably necessary to protect public health, in relation to some sporting activities or in order to promote equality of opportunity for disadvantaged persons.

1318. The Act establishes the Anti-Discrimination Commission and is administered by the Anti-Discrimination Commissioner. There is also a regional office of HREOC in Darwin.

1319. The Ombudsman (Northern Territory) Act 1978 establishes an office of the Ombudsman. The role of the Ombudsman is to investigate administrative action taken in any Department or authority and any action taken by a member of the police force in the situation where no reasonable alternative remedy is available.

1320. Any person or body may make a complaint to the Ombudsman. On completion of an investigation into an "administrative action" the Ombudsman reports to a senior officer of the relevant Department and then to the Minister. The Ombudsman may make recommendations in his or her report. Where the Ombudsman is not satisfied with the steps taken, he or she may report on the position to the Minister who must table the report in Parliament within three sitting days.

### Queensland

1321. In Queensland, the Anti-Discrimination Act 1991 prohibits discrimination on the grounds of sex, marital status, pregnancy, parental status, breastfeeding (goods and services areas only), age, race, impairment, religion, political belief or activity, trade union activity, lawful sexual activity, association with, or relation to, a person identified on the basis of any of the above attributes, sexual harassment and incitement to racial or religious hatred.

1322. The areas where discrimination is prohibited include: work; partnerships; industrial, professional, trade or business organizations; qualifying bodies; employment agencies; education; goods and services; superannuation; insurance; disposition of land; accommodation; club membership and affairs; administration of state laws and programmes; local government and advertising.

1323. The Act is administered by the Anti-Discrimination Commissioner and through decisions made by the Anti-Discrimination Tribunal. The resolution of disputes under the Act is achieved through conciliation and if this is unsuccessful, by a hearing before the Anti-Discrimination Tribunal. The decisions of the Tribunal may be enforced through the courts.

1324. In addition, the Act prohibits discrimination on the basis of age. An exemption is made for youth-work wages to permit a person to renumerate a worker who is under 21 years of age according to the worker's age. Age-based benefits are preserved so that a person may supply benefits and concessions on the basis of age. For example, a bus operator may give travel concession to people under the age of 12 or over the age of 70. Finally, the legislation provides that as a term of supplying goods and services to a minor, a person may require that a minor be accompanied by an adult if there would be a reasonable risk that the minor would cause a disruption or endanger himself or herself or others if not accompanied by an adult. As well, a person may discriminate against another person because the other person is subject to a legal incapacity and that incapacity is relevant to a transaction in which the person is involved. For example, it is not unlawful for a person to refuse to enter into a contract with a minor.

1325. Also in Queensland, the Health Rights Commission Act 1991 provides for the oversight, review and improvement of health services by establishing an accessible, independent Health Rights Commission. The Health Rights Commission:

> Preserves and promotes health rights;
>
> Receives and resolves health service complaints;
>
> Enables consumers and providers of health services to contribute to the improvement of health services;
>
> Provides education and advice about health rights and responsibilities; and
>
> Assists consumers and providers of health services to resolve complaints.

1326. The Health Rights Commission is headed by a Health Rights Commissioner whose functions include identifying and suggesting ways of improving health services and of preserving and increasing health rights. The Commission has developed a Code of Health Rights and Responsibilities, which has been submitted to the Minister for Health for his consideration.

### South Australia

1327. In South Australia, the Equal Opportunity Act 1984 prohibits discrimination on the grounds of race, sex, sexuality (which includes homosexuality, bisexuality and transsexuality), marital status, pregnancy, race, physical and intellectual impairment, age and sexual harassment.

1328. The areas where discrimination is prohibited include employment: partnerships; associations; qualifying bodies; employment agencies; education; provision of goods; services or facilities; and accommodation or land. The Act is administered by the Commissioner for Equal Opportunity and the Equal Opportunity Tribunal.

1329. Administratively, discrimination on the grounds of impairment has been interpreted very broadly under the Equal Opportunity Act 1984 so as to allow all HIV positive persons to have access to the complaints mechanism.

1330. There are exemptions to the operation of the Equal Opportunity Act 1984. They are listed below:

Charitable institutions that confer benefits wholly on persons of a particular race, persons of a particular sex, sexuality, marital status, age or age group, persons with impairment or pregnant women;

A scheme for the benefit of persons of a particular race, sex, marital status, age group or persons with a particular impairment;

Reasonable discrimination in employment on the basis of appearance or dress, where that appearance or dress is characteristic of or is an expression of that person's sexuality;

Discrimination on the ground of sexuality by a firm/promoter in determining who should be offered partnership in the firm where the firm has less than six members;

Discrimination on the ground of pregnancy, impairment or age in employment where the person would not be able to perform adequately without endangering him/herself;

Discrimination on the ground of pregnancy, impairment or age in employment where the person is unable to respond adequately to situations of emergency reasonably anticipated in connection with his/her employment;

Discrimination on the ground of pregnancy where it arises out of the dismissal of a pregnant woman from employment if the woman would not be able to perform the work genuinely and reasonably required of her without endangering herself or the unborn child or if a pregnant woman were unable to respond adequately to situations of emergency reasonably anticipated in connection with her duties and there is no other work that the employer could reasonably be expected to offer her;

Discrimination on the grounds of sex, sexuality, marital status and pregnancy in relation to religious appointments;

Discrimination on the ground of age where an act is done in compliance with an award or agreement made or approved under the Industrial Relations Act 1972;

Discrimination by an association on the ground of age where the association has, on a genuine and reasonable basis, established different classes of membership for persons of different age groups; and

Discrimination which occurs because of a child's lack of juristic capacity.

1331. Remedies available under the Equal Opportunity Act 1984 depend on the nature of the complaint. They include:

Conciliation (used where the focus is on achieving an individually tailored remedy such as damages, reinstatement or apology);

Undertakings to implement an equal opportunity policy; and

Structural changes within an educative framework.

1332. Decisions or orders of the Equal Opportunity Tribunal may be appealed to the Supreme Court of South Australia.

### Tasmania

1333. In 1995, Tasmania enacted the Sex Discrimination Act. The proscribed grounds of discrimination under the Act are: gender; marital status; pregnancy; parental status and family responsibilities in the areas of employment; education and training; provision of facilities; goods and services; accommodation; classes of memberships and activities of clubs; administration of state laws and state programmes and awards; and enterprise agreements and industrial agreements. In addition, victimization on the above grounds is also prohibited, as is sexual harassment.

1334. There are exemptions to the operation of the Act and these are listed below:

Charitable trusts conferring benefits wholly or partly for persons of a particular gender, marital status, pregnancy, parental status or family responsibilities;

Discrimination on the grounds of particular gender, marital status, pregnancy, parental status and family responsibilities, if it is reasonably necessary to comply with any state or federal law, or any order of a court or tribunal;

A scheme for the benefit of persons of particular gender, marital, pregnancy or parental status or with particular family responsibilities;

Discrimination on the ground of gender:

In a religious institution, if it is required by doctrines of the religion of the institution; or

In education, if it is for the purpose of enrolment in one gender schools or hostels; or

In employment, if it is for the purpose of the residential care of persons under the age of 18 years; or

In employment, if it is based on a genuine occupational qualification or requirement in relation to a particular position; or

In accommodation, if it is shared accommodation for less than five adult persons; or

In the provision or use of facilities, if those facilities are reasonably required for use by persons of one gender only; or

In respect of any benefit provided by a club if:

> It is not practicable for the benefit to be used simultaneously or to the same extent by both men and women; and
>
> That benefit is provided for the use of men and women separately from each other, or to men and women in a fair and reasonable proportion; or

In respect of membership of a club if the membership of the club is available only to persons of one gender;

Discrimination on the grounds of family responsibilities, parental status, pregnancy or marital status if that person requires special services and facilities, the supply of which would impose unjustifiable hardship;

Discrimination on the grounds of gender in a competitive sporting activity where participation is restricted to persons of one gender of 12 years of age or more; or

Discrimination on the grounds of gender, marital status, pregnancy, parental status or family responsibilities in the provision of services relating to insurance or superannuation.

1335. Remedies available under the Sex Discrimination Act 1994 are as follows:

An order prohibiting the respondent from repeating or continuing the discrimination or conduct;

An order requiring the respondent to redress any loss or injury suffered by the complainant;

An order requiring the respondent to employ, re-employ or promote the complainant;

Compensation for loss or injury;

A fine;

An order that a contract or agreement is to be varied or declared void;

An order requiring the respondent to apologize or make a retraction; or

Any other order that the tribunal considers appropriate.

1336. Decisions or orders of the tribunal may be appealed to the Supreme Court of Tasmania.

### Victoria

1337. In June 1995, the Victorian Parliament passed the Equal Opportunity Act 1995, which repealed and replaced the Equal Opportunity Act 1984.

#### Background

1338. The new Act was developed in response to a 1993 report of the Victorian Parliamentary Scrutiny of Acts and Regulations Committee. In 1993, the Committee undertook a comprehensive review of the Equal Opportunity Act 1984, inquiring into the effectiveness and efficiency of the 1984 Act in eliminating discrimination and providing redress for victims of discrimination. The Committee reported in November 1993, making numerous recommendations for reform of Victoria's anti-discrimination laws. Many of the Committee's recommendations are adopted in the Equal Opportunity Act 1995.

#### Grounds

1339. The Equal Opportunity Act 1995 prohibits direct and indirect discrimination on the grounds of: age (including the abolition of compulsory retirement ages); impairment; industrial activity; lawful sexual activity; marital status; physical features; political belief or activity; pregnancy; race; religious belief or activity; sex; status as a parent or carer and personal association in the areas of employment and education, and in the provision of goods and services, accommodation, membership of clubs, sport and in local government. Victoria is the first Australian jurisdiction to prohibit discrimination on the ground of "physical features" which is defined in the Act to mean a person's "height, weight, size or other bodily characteristics". In addition, the Act prohibits requests for information that could be used for discriminatory purposes and makes victimization and sexual harassment unlawful.

1340. There are exemptions to the operation of the Act. Some of these exemptions are listed below:

Discrimination in determining who should be offered employment in relation to the provision of domestic or personal services in or in relation to the employer's home;

An employer may limit the offering of employment to people of one sex where it is a genuine occupational requirement of the employment that the employees be of a particular sex;

Discrimination on the ground of political belief or activity in relation to employment as a ministerial adviser, member of staff of a political party and other similar employment;

An employer may limit the offering of employment to people with a particular attribute in relation to the provision of services for the promotion of the welfare or advancement of people with the same attribute, if those services can be provided most effectively by people with the particular attribute;

An employer may limit the offering of employment in a business carried on by him or her, to people who are the person's relatives;

Discrimination in determining who should be offered employment in relation to a small business employing no more than five employees;

An employer may set and enforce standards of dress and behaviour for employees that are reasonable having regard to the nature and circumstances of the employment;

Discrimination in relation to employment involving the care, instruction or supervision of children where the employer genuinely believes that the discrimination is necessary to protect the physical, psychological or emotional well-being of the children and, having regard to all the relevant circumstances, the employer has a rational basis for the belief;

A person may discriminate if the discrimination is necessary to comply with or is authorized by legislation. It should be noted that the Act obliges the Minister (the Victorian Attorney-General) to cause a review of all Victorian legislation to be undertaken for the purpose of identifying provisions which discriminate or may lead to discrimination;

Discrimination that is necessary to comply with an order of a court or tribunal;

Discrimination on the grounds of age, sex, marital status or impairment in relation to superannuation funds where the discrimination is required to comply with federal legislation or is based on actuarial or statistical data;

Exemption for instruments conferring charitable benefits;

Discrimination by religious bodies or religious schools if it is necessary to avoid injury to religious sensitivities or is in accordance with relevant religious beliefs or principles;

Discrimination if it is necessary to comply with a person's genuine religious beliefs or principles;

Discrimination in relation to "private clubs";

> Discrimination on the grounds of impairment or physical features if it is reasonably necessary to protect the health or safety of any person;
>
> Discrimination which occurs in the provision to people with a particular attribute of special services, benefits or facilities that are designed:
>
>> To meet the special needs of those people; or
>>
>> To prevent or reduce a disadvantage suffered by those people in relation to their education, accommodation, training or welfare.

Procedures

1341. The Equal Opportunity Act 1995 provides for complaints of alleged discrimination to be lodged with the Equal Opportunity Commission. The Act contains a new provision which enables a child or a parent of a child on the child's behalf to lodge a complaint of alleged discrimination with the Commission. Once a complaint has been lodged, the Equal Opportunity Commission has 60 days within which to investigate the complaint and either accept or reject the complaint. A decision of the Commission to reject a complaint can be reviewed, at the request of the complainant, by the Anti-Discrimination Tribunal.

1342. Complaints that the Equal Opportunity Commission considers reasonably possible to be conciliated successfully are referred to the Chief Conciliator for conciliation. Where the Commission is of the view that a complaint cannot be conciliated successfully, the complainant can have the complaint referred to the Anti-Discrimination Tribunal for a hearing. At various stages during the conciliation process provision is made for complainants either to refer a complaint to the Tribunal for hearing or to request the Tribunal to review a determination of the Commission. The Act also makes provision for the expeditious hearing of certain types of complaints where, for instance, there are special circumstances which require a speedy resolution of the complaint.

1343. The Equal Opportunity Act 1995 introduces a procedure for the resolution of what is termed "special complaints". Where a party to a complaint considers that the complaint is a "special complaint", the party can request the Tribunal to refer the complaint to the Supreme Court of Victoria for determination. The Supreme Court can make any order available to the Anti-Discrimination Tribunal (listed below). The Act provides avenues for parties to recover costs of a "special complaint" determined by the Supreme Court. For instance, where an agency of the state requests referral of a "special complaint" to the Supreme Court, the Act obliges the Court to order the state or agency of the state to pay the additional costs incurred by the other party as a result of the complaint being uplifted to the Supreme Court. Provision is also made in the Act for an unsuccessful complainant to recover some of the costs of the "special complaint" from the Appeal Costs Fund. A decision of the Supreme Court in a "special complaint" can be appealed, on a question of law, to the Court of Appeal of Victoria.

## Remedies

1344. After hearing evidence and representations made by the parties, the Anti-Discrimination Tribunal can find a complaint or any part of it proven and make one or more of the following orders:

An order that the respondent refrain from committing any further contravention of the Equal Opportunity Act 1995 in relation to the complaint;

An order that the respondent do anything specified in the order with a view to redressing any loss, damage or injury suffered by the complainant as a result of the contravention;

Find the complaint or any part of it proven but decline to take any further action in the matter; or

Find the complaint or any part of it not proven and make an order that the complaint or part be dismissed.

1345. The Tribunal can also make orders for costs in any proceedings before it, although the Tribunal has recently indicated in the case of Jacobs v. Towergrange Pty Ltd (EOB Case No 31/93) that it will exercise its discretion to award costs with caution. An order of the Tribunal can be appealed, on a question of law, to the Supreme Court of Victoria.

## Western Australia

1346. In Western Australia the Equal Opportunity Act 1984 prohibits discrimination on the grounds of sex, sexual harassment, marital status, pregnancy, family responsibilities and family status, race, racial harassment, religious or political conviction, physical and intellectual impairment, or age.

1347. The areas where discrimination is prohibited include: employment: partnerships; professional or trade organizations; qualifying bodies; employment agencies; education; access to places and vehicles; provision of goods; services and facilities; accommodation; and clubs.

1348. The Act is administered by the Commissioner for Equal Opportunity. If the Commissioner fails to conciliate a complaint, the complaint is referred to the Equal Opportunity Tribunal, an independent body. If the Commissioner declines or dismisses a complaint, the complainant can appeal this decision to the Equal Opportunity Tribunal. Remedies available to the Equal Opportunity Tribunal are as follows:

To award compensation to complainants, up to $40,000;

To restrain a respondent to a complaint from repeating or continuing an unlawful act of discrimination;

To order a respondent to take action to redress loss or damage to a complainant; or

To declare a contract void.

1349. In relation to racial vilification, the Western Australian Criminal Code includes the offence of possession, publication or display of written or pictorial material with the intention of creating racial hatred or harassing any racial group. Verbal communication is not within the ambit of the provisions.

## Article 27

### General

1350. Table 24 shows that 42 per cent (nearly 7 million) of the 16.9 million people living in Australia at the time of the 1991 census were either born overseas or had one or both parents born overseas. The equivalent figure in 1986 was 40 per cent. Table 25 shows a further breakdown of the Australian population by country of birth for 1981, 1991 and 1994, and table 26 shows immigrants by major birthplace groups and their Australian-born children. In relation to Australia's indigenous peoples, there were approximately 239,000 Aboriginal peoples and 27,000 Torres Strait Islanders (or 1.6 per cent of the total population).

1351. All residents of Australia, whether indigenous or immigrant, enjoy the same basic rights and obligations. Australia's multicultural policy is to accept the contribution of all cultures without encouraging ethnic or cultural separatism. It is policy to provide all Australians with the opportunity to participate fully in, and contribute to, our society.

1352. Notwithstanding the above, the development of multicultural and indigenous policies have traditionally been conducted separately in Australia. Indigenous peoples are a unique group in Australian society and their needs and interests have warranted, and continue to warrant, special attention.

1353. The commentary under this article reflects that division by first outlining the position of, and relevant policy and legislation in relation to, Aboriginal and Torres Strait Islander peoples and then dealing with multicultural policy applicable generally to the descendants of later immigrants.

1354. The protection of the rights contained in this article is provided under the general human rights machinery which exists in Australia; the most fundamental being the prohibition on racial discrimination. General human rights machinery is discussed further in the core document and under article 2, Federal legislation since the submission of previous report, above.

## Aboriginal and Torres Strait Islander peoples

1355. Throughout Australia, Aboriginal and Torres Strait Islander peoples live a variety of lifestyles - as members of urban or rural communities, on the fringes of towns or cities or in remote communities following a traditional lifestyle.

1356. The indigenous population is significantly more youthful than the overall population. The median age at the time of the 1991 census was under 20, with about 40 per cent under the age of 15. The national median age, by contrast, was over 30. (In relation to life expectancy, see under Health below.)

1357. In the five-year period to the next census in 1996, the Aboriginal and Torres Strait Islander population has been projected to increase by 13 per cent, to 303,000, with a figure of 340,000 projected for 2001.

## Aboriginal and Torres Strait Islander Commission

1358. The Aboriginal and Torres Strait Islander Commission Act 1989 established the Aboriginal and Torres Strait Islander Commission (ATSIC) by merging the Department of Aboriginal and Torres Strait Islander Affairs and the Aboriginal Development Commission. The purpose of the restructuring was to create a representative and advisory structure that would enable Aboriginal and Torres Strait Islander Australians to become involved in the decision-making processes affecting their lives.

1359. The objectives of the Aboriginal and Torres Strait Islander Commission Act 1989 include:

> Ensuring maximum participation of the indigenous peoples of Australia in the formulation and implementation of government policies that affect them;
>
> Promoting the concepts of indigenous self-management and self-sufficiency;
>
> Furthering economic, social and cultural development of Aboriginal and Torres Strait Islander peoples; and
>
> Ensuring coordination in the formulation and implementation of all relevant policies and programmes without diminishing in any way the responsibilities of all governments to provide services to indigenous peoples.

1360. One of the crucial elements in the effective operation of ATSIC is the system of Regional Councils, which represent the Aboriginal and Torres Strait Islander peoples in regions across Australia. All Aboriginal and Torres Strait Islanders vote to elect representatives to the Regional Councils. The Regional Councillors in turn elect Commissioners to the ATSIC Board under a zoning system. A further two commissioners are appointed by the Federal Minister responsible for Aboriginal and Torres Strait Islander Affairs.

1361. Torres Strait Islanders have their own representational arrangements pursuant to the Aboriginal and Torres Strait Islander Commission Act 1989. These include:

A Torres Strait Regional Authority which represents Torres Strait Islander and Aboriginal peoples who live in the Torres Strait area. The Torres Strait Regional Authority, which came into existence on 1 July 1994, has powers similar to ATSIC. See further under Article 1, Indigenous peoples above;

A Commissioner for the Torres Strait on the ATSIC Board of Commissioners who is elected from the Torres Strait Regional Authority. This Commissioner represents the Torres Strait area and Authority on ATSIC's Board of Commissioners; and

A Torres Strait Islander Advisory Board (TSIAB) which represents the interests of Torres Strait Islanders living outside the Torres Straits area. The functions of the TSIAB is to provide advice to the Minister for Aboriginal and Torres Strait Islander Affairs and ATSIC for furthering the economic, social and cultural advancement of Torres Strait Islanders living outside the Torres Strait area. This infrastructure ensures a continuing linkage between matters affecting Torres Strait Islanders residing in the Torres Strait area and elsewhere in Australia.

1362. These representational structures are backed up by administrative structures such as an ATSIC Torres Strait Regional Office, and an Office of Torres Strait Islander Affairs in Canberra.

Aboriginal reconciliation

1363. The establishment of the Council for Aboriginal Reconciliation by legislation in 1991 and the establishment of the Aboriginal Reconciliation Unit within the Department of the Prime Minister and Cabinet are further administrative measures which are designed to investigate and implement ways of enshrining the rights of indigenous peoples within the legislative and social framework of the country.

1364. The Council's primary objective is to promote reconciliation between Aboriginal and Torres Strait Islander peoples and the wider Australian community. The mandate of the Council will expire on 1 January 2001, coinciding with the centenary of Australia's federation.

1365. Eight key issues have been identified by the Council as being essential to the reconciliation process. These are:

A greater understanding of the importance of the land and sea in Aboriginal and Torres Strait Islander society;

Better relationships between Aboriginal and Torres Strait Islander peoples and the wider community;

Recognition that Aboriginal and Torres Strait Islander culture and heritage are a valued part of the Australian heritage;

A sense for all Australians of a shared ownership of their property;

A greater awareness of the causes of disadvantage that prevent Aboriginal and Torres Strait Islander peoples from achieving fair and proper health, housing, employment and education;

A greater community response to addressing the underlying causes of the unacceptably high levels of Aboriginal and Torres Strait Islander peoples held in custody (see further below);

A greater opportunity for Aboriginal and Torres Strait Islander peoples to control their destinies; and

Agreement on whether the process of reconciliation would be advanced by a document of reconciliation, a change to the Constitution, or some other changes in the law.

1366. The Council consists of up to 25 members, including at least 12 Aboriginal and two Torres Strait Islander people, and is broadly representative of the Australian community. The Chairperson and Deputy Chairperson of the Aboriginal and Torres Strait Islander Commission are ex officio members. Its membership also includes persons nominated by the Government and by opposition parties represented in the Federal Parliament.

Recognition of customary law

1367. The Australian Government recognizes that while article 27 does not predicate the right to cultural enjoyment or recognition of indigenous laws, certain customary laws and traditions may assist in the enjoyment of the right under this article.

1368. In 1986 the Australian Law Reform Commission (ALRC) issued a report entitled "The recognition of Aboriginal customary laws". The ALRC report contained recommendations on ways in which customary laws could be recognized within the framework of the general law in Australia and called on the federal and state governments to act to implement recommendations dealing with matters within their areas of responsibility.

1369. The ALRC recommendations in the 1986 report were based on the following underlying principles:

Aboriginal customary law should be recognized, in appropriate ways, by the Australian legal system;

Such recognition must occur against the background and within the framework of the general law;

The creation of new and separate legal structures should be avoided unless the need for them is clearly demonstrated; and

> In most instances, codification or direct enforcement are not appropriate forms of recognition nor is the exclusion of the general law desirable.

1370. As most of the offences committed in Australia are offences against state laws, many of the ALRC report's recommendations relate to matters that are predominantly the responsibility of state governments. Notwithstanding this, both the federal and some state governments have attempted to implement the ALRC recommendations and to accommodate developments occurring since the ALRC report was produced. A number of federal agencies have provided functional recognition of customary laws in the manner recommended by the ALRC, and the federal and state governments participate cooperatively in a number of bodies and forums where issues relating to the recognition of customary law arise for consideration.

1371. The major areas considered by the report are discussed below.

## Criminal law and sentencing

1372. Recognition of customary laws in the criminal justice system at the state and federal levels has been of a general and non-discriminatory nature encompassing the laws and customs of all minority groups, rather than giving specific legislative recognition to the customary laws or practices of indigenous Australians.

1373. In particular, ethnic background is taken into account in the operation of objective tests for the defence of provocation, and may be adopted by the courts for other defences. When determining sentences, courts already in practice take account of the customary laws of the community of the offender. Indeed, the Federal Crimes Act 1914 requires the court to consider cultural background as a factor in sentencing. At the prosecution stage, the discretion of the prosecutor is also sufficiently wide to allow customary law considerations to be taken into account.

1374. The Model Criminal Code Officers Committee is currently developing the Model Criminal Code (see further under article 6, Criminal law, above), to be enacted by the year 2001. Indigenous peoples are involved in the public seminars about the development of the code and comments and submissions are received from indigenous interests. The Committee is reviewing an ALRC recommendation in relation to a partial defence based on customary law which would reduce murder to manslaughter.

## Local justice mechanisms for Aboriginal communities

1375. The demand for local justice mechanisms in Aboriginal communities is uncertain at present. However, ATSIC has observed that there are moves to formally recognize local justice mechanisms in some states. In the Northern Territory, for example, there is growing recognition of the appropriateness of alternative dispute resolution as a method of resolving disputes within communities, so as to maintain social harmony within a small-scale environment. In the Territory, alternative dispute resolution is considered a mechanism for promoting self-management and self-sufficiency within

Aboriginal communities. The Office of Aboriginal Development is developing an Aboriginal law and justice strategy that proposes to incorporate local justice mechanisms.

1376. In Queensland, the implementation of a local justice initiatives programme in 1995/1996 will extend the concept of community justice panels in indigenous areas. This is to enable Aboriginal and Torres Strait Islander communities to establish or consolidate community justice groups to reduce crime in the communities and participate in the operation and application of the state justice system. This programme will complement other indigenous justice initiatives such as Justice of the peace training, Community Council by-laws, community police and courts and Aboriginal mediation projects.

Evidence and property

1377. Recognition of customary law by the Federal Government with respect to evidence has been achieved primarily through amendments to the Crimes Act 1914. Paragraph 16A (2) (m) of the Act provides that a person's cultural background is a relevant factor to be considered in sentencing.

1378. ALRC recommended that legislation be enacted so that Aboriginal persons knowledgeable about customary laws and traditions can give evidence about those customs and traditions without such evidence being ruled inadmissible as hearsay or opinion evidence. It was also recommended that secret information about these matters be protected. The Native Title Act 1993 and the Aboriginal Land Rights (Northern Territory) Act 1976 make some provision for proof of customary laws. The Native Title Act 1993 provides that the Native Title Tribunal, may on its own initiative or on the application of a party, direct that an inquiry or part thereof be held in private. In determining whether an inquiry is to be held in private, the Tribunal must have due regard to the cultural and customary concerns of Aboriginal peoples and Torres Strait Islanders.

Marriage, children and family property

1379. The Federal Attorney-General's Department has identified a number of difficulties associated with implementing ALRC recommendations on the recognition of traditional marriage. The Department is opposed to recognizing a marriage involving a party who is too young to marry according to Australian law. It is also opposed to marriages which involve polygamy and lack of consent. However, to ameliorate the effects of an absence of legal recognition of these relationships, all jurisdictions have introduced laws which recognize the relationships either generally (de facto legislation) or for particular purposes (status of children, social security).

1380. In the Australian Capital Territory, South Australia and New South Wales, a de facto spouse may participate in a distribution of an intestate decreased estate.

1381. The ALRC report recommends functional recognition of the traditional marriage as the most appropriate response to customary law in this area. Many federal agencies have endeavoured to incorporate such recognition into the performance of their functions. The Federal Department of Social Security has adopted an administrative approach to implementing the ALRC recommendations under which the members of a "principal" traditional relationship are paid benefits at the married rate and other partners are paid on the basis that they are single. This approach was arrived at in conjunction with the then Department of Aboriginal Affairs. The Department of Social Security suggests that this approach takes account of traditional polygamous domestic arrangements in which the other partners to a traditional marriage will usually not be supported financially by their spouse.

1382. The Federal Department of Industrial Relations has reflected the ALRC recommendations in the Safety and Rehabilitation and Compensation Act 1988. In the Act the definition of spouse has been extended to include, in the case of an employee or a deceased employee who is or was a member of the Aboriginal race or the descendant of indigenous inhabitants of the Torres Strait Islands, a person who is or was recognized as the employee's husband or wife by the custom prevailing in the tribe or group to which the employee belongs or belonged.

1383. In the Northern Territory, a traditional spouse is entitled to sue for benefits associated with accident compensation (including workers' compensation), compensation on death, criminal injuries compensation, repatriation benefits and superannuation.

1384. In the Northern Territory, there is legislation which allows, to varying extents, and in varying ways, distribution of a deceased's property according to traditional customary law.

1385. In relation to substitute care of Aboriginal children, the Federal Government has been involved in the development and implementation of the Aboriginal child placement principle. The Aboriginal placement principle is discussed further under article 24, Disadvantaged children, above.

## Land Rights

1386. The land rights movement has been the most obvious manifestation of the ongoing demands of indigenous Australians to have their customary laws recognized. There have been significant developments recently in the areas of Aboriginal and Torres Strait Islander land rights and customary law. On 1 January 1994 the federal Native Title Act 1993 (except for Part 10) commenced operation. The Native Title Act 1993 was enacted in response to a historic decision of the High Court in Mabo v. Queensland (No. 2) (1992) 175 CLR 1 referred to as Mabo (No. 2). The case commenced in 1982 when a group of Torres Strait Islanders led by Mr. Eddie Mabo began a decade-long struggle to have their traditional title to land on the Murray Islands recognized.

### Mabo (No. 2)

1387. The High Court of Australia decided in Mabo (No. 2) that the Torres Strait Islanders in question, the Meriam people, were entitled as against the whole world to the possession, occupation, use and enjoyment of (most of) the land of the Murray Islands in the Torres Strait. In reaching this conclusion a majority of the Court held that the common law of Australia recognizes a form of native land title. Such native land title exists in accordance with the laws and customs of indigenous peoples:

> Where those people have maintained their connection with the land; and
>
> Where their title has not been extinguished by acts of imperial, colonial, federal or state governments.

### Terra nullius

1388. The Court rejected the traditional doctrine that Australia was terra nullius (i.e. land belonging to no one) at the time of European settlement, with the implication that absolute ownership of land was vested at that time in the Crown, but rather accepted that native title rights survived settlement, though subject to the sovereignty of the Crown. Brennan J, with whom Mason CJ and McHugh J agreed, indicated that the Court could not perpetuate a view of the common law which was unjust, did not respect all Australians as equal before the law and was out of step with international human rights norms. Deane, Gaudron and Toohey JJ also rejected the doctrine of terra nullius as repugnant and inconsistent with historical reality.

### Native title

1389. The content of native title is to be determined according to the traditional laws and customs of the title holders, but there are some common characteristics. It is inalienable (that is it cannot be transferred) other than by surrender to the Crown or pursuant to traditional laws and customs. Native title is a legal right that can be protected, where appropriate, by legal action. It may be possessed by a community, group, or individual depending on the content of the traditional laws and customs. It is not frozen as at the time of European settlement.

### Relationship to other interests

1390. Native title does not have legal primacy over other titles. This is clear from Mabo (No. 2) and the subsequent High Court decision in Western Australia v. The Commonwealth (1995) 128 ALR 1, which upheld the validity of the key provisions of the Native Title Act 1993. This follows from the fact that the Crown can make grants over land which is the subject of native title and which will extinguish native title to the extent of any inconsistency. Further, like other legal rights, including property rights, native title can be dealt with, extinguished or expropriated by the Crown.

### The Native Title Act 1993

1391. In response to the decision in Mabo (No. 2), the Federal Government enacted the Native Title Act 1993. In short, the Act:

> Recognizes native title and sets down relevant basic principles;

Provides for the validation of past acts which may be invalid because of the existence of native title;

Provides for a future regime in which native title rights are protected and conditions imposed on acts affecting native title land and water;

Provides a process by which native title rights can be established and compensation determined, and by which determinations can be made as to whether future grants can be made or acts done over native title land and waters; and

Provides for a range of other matters, including the establishment of a National Aboriginal and Torres Strait Islander Land Fund (see below).

1392. Native title, as defined in the Act, encompasses a broad spectrum of rights and interests that include hunting, fishing and gathering rights (see subsections 223 (1) and (2)). However, they may extend to much greater rights (cf. the order of the High Court in Mabo (No. 2)).

1393. As indicated above, the Native Title Act 1993 exempts holders of native title rights from federal or state licence requirements relating to hunting, fishing or gathering. A holder of native title rights must carry out those activities in the exercise of his or her native title rights and for personal, domestic and non-commercial communal needs.

1394. The Act provides an institutional framework for dealing with issues of native title. To provide the most effective means of dealing with issues of native title, the Act establishes a new body, the National Native Title Tribunal (NNTT), and gives the Federal Court jurisdiction in these matters.

1395. The NNTT was established on 1 January 1994 as an independent body to deal with claims to native title, claims for compensation and to make decisions about whether proposed future acts over native title land and waters may proceed. Applications are initially made to the Native Title Registrar. If various requirements are met, the Registrar must accept an application for a native title determination by persons claiming to hold the title unless he or she is of the opinion that the application is frivolous or vexatious or that prima facie a claim cannot be made out. In this case, the application must be referred to a presidential member, who must give the applicant an opportunity to show that the application should be registered. Acceptance is a procedural matter but an application must be accepted before the Tribunal can consider the claim. The Tribunal seeks to mediate native title and compensation claims but if this mediation is unsuccessful, the matter is referred to the Federal Court.

1396. NNTT also plays a significant role in determining whether certain future activities, particularly mining, can take place on native title land or land the subject of a claim. Native title holders and claimants are given a special right to be notified about such activities and to negotiate about whether they can proceed. It is not a veto and, if agreement cannot be reached, NNTT can decide if the activity can proceed and, if so, on what terms.

1397. The Federal Court hears contested claims for determination of native title or for compensation. The Court also hears appeals on questions of law from the Tribunal in relation to proposed future acts over native title land and waters and from decisions of presidential members not to accept an application for a determination of native title.

1398. Both NNTT and the Federal Court are obliged to discharge their functions in an informal and economical manner and are not bound by legal forms, technicalities or the rules of evidence. They must have regard to the cultural and customary concerns of Aboriginal and Torres Strait Islander peoples.

1399. The Act also provides for representative Aboriginal and Torres Strait Islander bodies, with Commonwealth funding, to represent native title claimants in negotiations and litigation, assist them with their claims and to help in the resolution of disagreements among rival claimants.

1400. The Aboriginal and Torres Strait Islander Social Justice Commissioner has the responsibility of preparing an annual report on the operation of the Native Title Act 1993 and the effect of the Act on the exercise and enjoyment of human rights of Aboriginal and Torres Strait Islander peoples. The Act also gives the Minister the right to request the Commissioner to prepare a report on any matter relating to the rights of indigenous peoples under the Act.

Land fund

1401. The Land Fund and Indigenous Land Corporation (ATSIC Amendment) Act 1995 was passed by the Federal Parliament on 21 March 1995. The Land Fund is intended to provide a means to benefit indigenous Australians, particularly those who, through dispossession or disconnection from their traditional lands, cannot meet the criteria for a native title claim. Such indigenous peoples can access the fund to acquire, manage and maintain land. The Act also established the Indigenous Land Corporation, which is responsible for the purchase of lands. The Corporation will enable the land acquired to be managed in a sustainable way to produce financial, cultural and social benefits for Aboriginal and Torres Strait Islander peoples and their children. The Land Fund received $200 million in the 1994-1995 financial year. (The Corporation commenced operations on 1 June 1995.)

Jervis Bay Territory

1402. The Federal Aboriginal Land Grant (Jervis Bay Territory) Act 1986 establishes the Wreck Bay Aboriginal Community Council as a body corporate to which the responsible Minister may grant Jervis Bay Territory land in inalienable freehold title. An initial grant of 403 hectares (Wreck Bay Village and surrounds) was made in 1987 and in 1995 the Jervis Bay National Park and the Jervis Bay Botanic Gardens were also granted to the Council.

States

1403. Under the Native Title Act 1993, state bodies which are recognized by the Federal Government may also hear native title claims. Where the Federal

Government has recognized a state body, claimants can choose whether to lodge their claims in the National Native Title Tribunal or the recognized body. The criteria and standards for state bodies are set out in section 251 of the Native Title Act 1993.

1404. To date, South Australia (Native Title (South Australia) Act 1994) is the only state to have had its bodies recognized. It has also had a determination that its regime for mining on, and the compulsory acquisition of, native title land meets the Federal Government's criteria. Queensland has also legislated to establish the Queensland Native Title Tribunal (Native Title (Queensland) Act 1994), but this is yet to be recognized.

1405. Other state legislation detailed below also grants Aboriginal and Torres Strait Islander peoples rights over land. See also under article 12, Aboriginal and Torres Strait Islander land, above.

### Australian Capital Territory

1406. The Australian Capital Territory Native Title Act 1994 gives effect to the Australian Capital Territory's intention to participate in the national scheme created by the Federal Native Title Act 1993. The Australian Capital Territory Act validates and confirms the existing titles, legislation and land management practices and uses to the maximum extent allowed by the Commonwealth Act. Native title claims in the Australian Capital Territory will be made to the Commonwealth Native Title Tribunal.

### New South Wales

1407. In New South Wales, the Aboriginal Land Rights Act 1983 was enacted as beneficial and remedial legislation designed to give important rights in Crown land to the representatives of Aboriginal and Torres Strait Islander peoples who have suffered substantial injustice and loss consequent upon the deprivation of their land following the first white settlement. It enables grants of land to be made to Aboriginal and Torres Strait Islander peoples, thereby entitling them to management of their own land.

1408. The Aboriginal Land Rights Act 1983 provides for the annual payment of 7.5 per cent of the state land tax to the New South Wales Aboriginal Land Council. The Act provides that one half of that amount must be invested and the remaining half be used in the administration of state, regional and local land councils. The appropriation from land tax revenue will cease in 1998, at which time it is expected that the investment fund will amount to approximately $500 million and, through further investment, will maintain self-sufficiency.

1409. The Aboriginal Land Rights Act 1983 reinforced the right of Aboriginal and Torres Strait Islander peoples to enjoy their own culture and religion. The Act recognizes the inseparability between the culture, religion and the land, and makes provision with respect to land rights for Aboriginal and Torres Strait Islander peoples, including provision for the constitution of the Aboriginal Land Council, in which land is vested and which can acquire land.

## Northern Territory

1410. The ownership of land by Aboriginal people in the Northern Territory is mainly governed by federal legislation, that is, the Aboriginal Land Rights (Northern Territory) Act 1976. However, Aboriginal interests in land are also recognized by the Pastoral Land Act 1992. Under this Act, Aboriginal associations incorporated under either federal or territory legislation may receive title to areas of land for community residential purposes. The advantages of these "community living area" titles are protection from compulsory acquisition (except acquisition of easements for essential services) and protection against alienation. In addition, under the Aboriginal Land Act 1978, permits are required to enter Aboriginal land, except for a specified group of people, and the Administrator may restrict entry into seas adjoining Aboriginal land.

## Queensland

1411. In Queensland, the Aboriginal Land Act 1991 and the Torres Strait Islander Land Act 1991 provide for the grant and claim of certain categories of land within Queensland.

## South Australia

1412. South Australia was the first state in Australia to enact Aboriginal (and Torres Strait Islander) land rights legislation. Areas of land in South Australia are held on behalf of Aboriginal (and Torres Strait Islander) peoples pursuant to the Pitjantjatjara Land Rights Act 1981 and the Maralinga Tjarutja Land Rights Act 1984. In respect of the Pitjantjatjara lands, land is granted to a body corporate comprising all Pitjantjatjara and is administered by Anangu Pitjantjatjara which must ascertain the wishes and opinions of all traditional owners and protect their interests in relation to the management, use and control of the lands. The Maralinga land is administered by Maralinga Tjarutja. See also, in relation to article 12, Aboriginal and Torres Strait Islander land, above.

## Tasmania

1413. The Aboriginal Lands Act 1995 transfers 12 areas of land throughout the State to the Aboriginal community.

1414. Ownership of the land is to be vested in an elected Statutory Land Council, the electors being all Aboriginal people in Tasmania 18 years and over. The Council is to be managed by a Committee of eight Aboriginal people comprising two representatives each from the north, north-west and south of Tasmania and one representative each from Cape Barren and Flinders Islands.

1415. There are a number of leases and licences on the land to be transferred. These are presently issued by the Crown. The Land Council will take responsibility for the issue and management of leases and licences in future.

1416. In respect of the land at Risdon Cove, the public will retain the right of access during daylight hours except when a significant Aboriginal cultural event is being held on that land. In addition there is reserved to the Crown the right to construct and fence a road over the land.

1417. The land to be transferred to the Aboriginal community is to be exempt from compulsory acquisition by the Crown or local authorities, but will be subject to local and state government laws relating to building approvals, planning and development controls, environment protection, occupational health and safety and public health laws.

1418. The Land Council will be exempt from paying land tax on culturally significant land provided it does not receive a commercial return on the land or lease it to third parties. Similarly, it will be exempt from rates where the site is used solely for cultural purposes.

1419. The Land Council will have the ownership of all minerals in the land to a depth of 50 metres, except for oil, helium, atomic substances and geothermal substances. In addition, the sites will be excluded from any mining tenement applications, except where the Land Council supports the application.

### Victoria

1420. The Aboriginal Lands Act 1970 transferred the ownership of the former reserves at Lake Tyers and Framlingham to Aboriginal communities. This was the first time in Australia that Crown land reserved for Aboriginal people had been transferred with unconditional freehold title to Aboriginal people residing at these properties.

1421. The Victorian Government further enacted:

> The Aboriginal Lands (Aborigines' Advancement League) (Watt Street, Northcote) Act 1982 and the Aboriginal Land (Northcote Land) Act 1989, which granted land to the Aborigine's Advancement League Incorporated at Northcote;
>
> The Aboriginal Lands Act 1991, which granted the Coranderrk Mission Cemetery and the Ebenezer Mission Cemetery to various Aboriginal communities; and
>
> The Aboriginal Land (Manatunga Land) Act 1992, which granted land to the Murray Valley Aboriginal Co-operative Limited at Robinvale.

1422. The Victorian Government supports the provision of appropriate public lands to local Aboriginal communities where the historical facts warrant that course. Title will be freehold and will normally be subject to the same rights and responsibilities of ownership as apply generally in the state.

1423. The Victorian Government provides capital grant funding assistance to Aboriginal community organizations through the Aboriginal Capital Grants Program administered by Aboriginal Affairs Victoria to assist communities to acquire land and capital assets. Over 50 properties have been purchased throughout Victoria for Aboriginal community organizations.

### Western Australia

1424. The land needs of Aboriginal people in Western Australia are currently met through provisions of the Land Act 1933 and the Aboriginal Affairs Planning Authority (AAPA) Act 1972. Land can be reserved under the Land Act for Aboriginal use and benefit, vested in the Aboriginal Lands Trust and leased to the appropriate Aboriginal incorporated body for 99 years under the Aboriginal Affairs Planning Authority Act. In many instances, the status of the land as reserved for Aboriginal people cannot be altered in any way without reference to both houses of parliament. A 1995 amendment to the Land Act gave Aboriginal people access to perpetual leasehold over Crown land.

1425. The Aboriginal Lands Trust, through the Aboriginal Affairs Department, has sought to acquire land for the use of Aboriginal people through purchase or by creation of reserves on Crown land and through excisions from pastoral leases.

1426. The Land (Titles and Traditional Usage) Act has been repealed as a consequence of the 16 March 1995 High Court decision which ruled that the legislation was not compatible with the Commonwealth Native Title Act. The Western Australian Government is therefore complying in full with the Native Title Act.

1427. A review of the Aboriginal Affairs Planning Authority Act has commenced, with a parallel review of the Aboriginal Lands Trust estate.

1428. The Land Administration Bill is under across-government scrutiny as a replacement for the Land Act.

### Indigenous women

1429. The Australian Law Reform Commission's report on women's access to the legal system, "Equality Before the Law" (see further commentary under article 3, Equality before the law, above), referred to the difficulties faced by Aboriginal and Torres Strait Islander women in gaining access to justice and realizing equality before the law. The Commission observed that, of all the groups of women considered during consultations, "Aboriginal and Torres Strait Islander women are least well served by the legal system". Indigenous women face multiple disadvantages, including discrimination on the basis of their gender and as a result of their cultural backgrounds. The Commission stated that "the need for legal services which are responsive to the needs of Aboriginal and Torres Strait Islander women is urgent".

1430. In addition, the particular needs of Aboriginal women were a focus of the National Committee on Violence Against Women, which ran from 1990 to 1993. Research into the needs of Aboriginal and Torres Strait Islander women subjected to violence was undertaken by the Committee. The Office of the Status of Women is currently working with the Family Violence Intervention Program of ATSIC to produce community education materials on violence against women for use in Aboriginal and Torres Strait Islander communities.

1431. The federal community education programme "Stop violence against women", funded from 1992 to 1995, has also identified Aboriginal and Torres Strait Islander women and women from non-English speaking backgrounds as target groups. Projects funded include:

Training and workshops for Aboriginal and Torres Strait Islander women and service providers on responding to sexual assault;

Consultations with Aboriginal and Torres Strait Islander communities and outstations about measures to improve the lot of women; and

Production of an educational video on domestic violence for the Aboriginal and Torres Strait Islander communities.

1432. In March 1993, the National Women's Consultative Council sponsored "Safe keeping: women's business", an Australian national indigenous women and museums conference. The conference developed policy guidance for governments on museums and their portrayal of Aboriginal and Torres Strait Islander women's culture. It canvassed the views, concerns and wishes of indigenous women about cultural collection, conservation and display.

## Culture and Education

### Aboriginal and Torres Strait Islander studies

1433. Alongside the growing interest in Australia in the preservation and diffusion of Aboriginal and Torres Strait Islander culture there is increasing acknowledgment that Aboriginal and Torres Strait Islander science and technology is of value. Bodies such as the Australian Institute of Aboriginal and Torres Strait Islander Studies, the National Parks and Wildlife Service and the Commonwealth Scientific and Industrial Research Organisation have begun to investigate traditional Aboriginal and Torres Strait Islander knowledge and expertise in areas such as the use of fire (for regeneration of flora), concepts of sickness and health, and knowledge about plants and the processing of food.

1434. Application of Aboriginal and Torres Strait Islander scientific knowledge is occurring through the incorporation of Aboriginal and Torres Strait Islander techniques into environment conservation practice in Northern Territory national parks. Traditional healers are being used in the delivery of health services in a number of tradition-oriented Aboriginal and Torres Strait Islander communities. Aboriginal and Torres Strait Islander knowledge of and classifications for flora and fauna are also being incorporated into the curricula of various Northern Territory schools.

1435. The Australian Institute of Aboriginal and Torres Strait Islander Studies was constituted in 1989 by an act of Federal Parliament to promote Aboriginal and Torres Strait Islander studies, to publish or assist in the publication of the results of Aboriginal and Torres Strait Islander studies, and to encourage and assist cooperation among universities, museums and other institutions concerned with Aboriginal and Torres Strait Islander studies. It also assists these institutions in training research workers in fields relevant to Aboriginal and Torres Strait Islander studies.

Assistance for Aboriginal and Torres Strait Islander people

1436. The general development and education of Aboriginal and Torres Strait Islander children can be affected by a number of factors. These include a higher than average level of ill health and associated separations from the family unit, and remoteness from population centres. School retention rates for Aboriginal and Torres Strait Islander children, while improving, are significantly lower than for the general population. For example, between 1985 and 1992 the retention rate to year 12 of indigenous students rose from 14 per cent to 25 per cent. Table 31 shows the progression through secondary school from 1988 to 1992 for Aboriginal and Torres Strait Islander boys and girls, and other Australians. Rates for other students in the same period, however, rose from 58 per cent to 78 per cent. The 1991 census showed that, among 20- to 24-year-olds, the proportion of indigenous peoples attending educational institutions was about one third of the non-indigenous rate.

1437. To redress the educational disadvantage suffered by Aboriginal and Torres Strait Islander children, the Federal Government established a task force to examine the issue. The task force reported in 1988. It identified the need to develop a comprehensive and coordinated national Aboriginal education policy. Further detailed information on this policy and programmes to redress the educational disadvantage of Aboriginal and Torres Strait Islander children is in Section G of Australia's first report under the Convention on the Rights of the Child

Media

1438. Since the submission of Australia's second report, there have been a number of significant developments in Aboriginal and Torres Strait Islander broadcasting. In various parts of Australia, radio programmes are provided for and by Aboriginal and Torres Strait Islander peoples in their own languages and in English. There are at present seven licensed Aboriginal community broadcasters operating in all states except the Australian Capital Territory, Tasmania and Victoria. A number of other community radio stations have also provided air time, so that Aboriginal and Torres Strait Islander peoples can present their programmes. The National Indigenous Media Association of Australia, as well as Aboriginal and Torres Strait Islander organizations using community broadcasting facilities, are assisted by the Federal Government to undertake special workshop training in radio broadcasting techniques. An Aboriginal and Torres Strait Islander television company, Imparja Television, was awarded the Central Australian commercial television licence in 1988.

1439. Since 1987, ATSIC and its predecessors have been implementing the Broadcasting for Remote Aboriginal Communities Schemes (BRACS) which provide the means by which Aboriginal and Torres Strait Islander peoples in remote areas have access to, and control of, local television and radio services in their own communities. As at June 1993, there were 80 BRACS communities around Australia. BRACS services broadcast over 280 hours of Aboriginal and Torres Strait Islander programming per week, much of which is in the local language(s).

1440. Further, the Australian Broadcasting Corporation (ABC) and the Special Broadcasting Service (SBS) have a role, as national broadcasting organizations (see commentary under article 19, Broadcasting ownership, above) in providing training for Aboriginal and Torres Strait Islander peoples in broadcasting skills both for careers in these organizations and for broadcasting within the Aboriginal and Torres Strait Islander broadcasting organizations. ABC now has more than 80 Aboriginal and Torres Strait Islander staff working in all fields and levels of broadcasting. Some earlier trainees are now playing an important role in management at ABC, in radio as well as television.

1441. With the advent of the satellite and its potential to transmit television and radio to remote areas, ABC is consulting with Aboriginal and Torres Strait Islander communities in such areas on the impact of Western media on their cultures, and on what control those communities should have over access of the media to those remote Aboriginal and Islander communities.

1442. Recommendations 205 and 208 of the Royal Commission into Aboriginal Deaths in Custody highlighted the need for a strategic approach to Aboriginal and Torres Strait Islander training and employment in the media as one of the ways to overcome the negative presentation of Aboriginal and Torres Strait Islander issues in the Australian media. By way of response, training and employment strategies are now in place with two national television networks, two regional television networks, three indigenous media organizations and four film agencies.

1443. Further, an agreement has been signed with ABC Radio Resources to allow Alphatec, the technical arm of ABC Radio, to provide technical training to indigenous media organizations. The training will be industry recognized and accredited and will be available to other indigenous media organizations.

1444. The ABC code of practice requires journalists to respect Aboriginal and Torres Strait Islander culture and to exercise care when treating traditional matters. ABC has also developed editorial policies to cover the presentation of indigenous issues.

1445. Aboriginal or Torres Strait Islander coordinators are employed by ABC (three), SBS (one), the Australian Film Commission and the National Indigenous Media Association of Australia. There are specialist Aboriginal units in both ABC Radio and Television. The television unit focuses on production. The Aboriginal Programming and Employment Committee provides a forum for the promotion of Aboriginal programming, monitoring or initiatives and progress, identifies problems and suggests remedies. The Indigenous Branch at the Australian Film Commission reviews and develops policies, guidelines and strategies to provide for indigenous access to the Commission's funding programmes.

## Indigenous cultural heritage

1446. At federal government level, the following measures have been taken to protect Aboriginal and Torres Strait Islander cultural heritage and promote cross-cultural understanding between Aboriginal and Torres Strait Islander and non-Aboriginal peoples:

> The Australian Heritage Commission Act has special provisions to protect places associated with Aboriginal and Torres Strait Islander history, culture or beliefs. Eight hundred and thirty Aboriginal and Torres Strait Islander places are now included on the Register of the National Estate. The Commission consults closely with Aboriginal and Torres Strait Islander bodies concerned with sites. Three of the five Australian areas on the World Heritage List are of great Aboriginal significance: Kakadu National Park, the Willandra Lakes Region and the Western Tasmania Wilderness National Parks.
>
> The Wet Tropics of Queensland World Heritage Area Conservation Act 1994 takes into consideration Aboriginal interests in the area, including its spiritual, social, historical and cultural importance. The Act ensures that Aboriginal people have a role in the area's management. Specifically, it provides for Aboriginal representation on the Wet Tropics Management Authority and the Authority's advisory committees. Four of the 11 Australian areas on the World Heritage List are listed for their outstanding universal cultural values: Kakadu National Park; Willandra Lakes Region; Tasmanian Wilderness; and Uluru-Kata Tjuta National Park.
>
> The other seven Australian properties on the World Heritage List also contain areas of significance to Aboriginal people and to Torres Strait Islander peoples. Initiatives are under way to increase indigenous communities' participation in the management of Australia's world heritage properties.
>
> The Aboriginal and Torres Strait Islander Heritage Protection Act 1984 provides a means for the Commonwealth to protect significant Aboriginal and Torres Strait Islander areas and objects. The Act complements existing state laws and is used only as a last resort where those laws do not provide effective protection of such areas and objects from injury or desecration. The Act enables the Minister for Aboriginal and Torres Strait Islander Affairs to make declarations for the protection of those areas and objects. High penalties are provided for the breach of such declarations.
>
> The National Museum of Australia Act 1980 provides that one of the Museum's three major components shall be a gallery of Aboriginal and Torres Strait Islander Australia. Subsection 5 (4) of the Act requires a policy of involvement by Aboriginal and Torres Strait Islander peoples or their descendants.
>
> The Aboriginal Arts Board plays a significant role in helping to conserve Aboriginal and Torres Strait Islander culture.

The export of certain important Aboriginal and Torres Strait Islander materials is prohibited under the Customs (Prohibited Exports) Regulations.

The Protection of Movable Cultural Heritage Act 1986 provides for the protection from export of objects which constitute the movable cultural heritage of Australia. Regulations made under this Act (in 1987 and 1988) include the National Cultural Heritage Control List categories of objects of Aboriginal and Torres Strait Islander heritage.

Some individual Aboriginal and Torres Strait Islander sites are now included on the Register of the National Estate, maintained under the Australian Heritage Commission Act 1975.

1447. The National Museum of Australia Act 1980, which established the Museum of Australia, is capable of facilitating the return of material relating to Aboriginal and Torres Strait Islanders from the national collection to Aboriginal and Torres Strait Islander communities. The Act also provides for Aboriginal people and Torres Strait Islanders to be involved in the development and maintenance of the Museum's planned Gallery of Aboriginal and Torres Strait Islander Australia.

1448. Australian law does not recognize group ownership of intellectual property, such as copyright. Under copyright law, the creator of a literary, dramatic, musical or artistic work is usually recognized as the owner of copyright in the work. It is that individual who is able to protect his or her work against unauthorized exploitation. Copyright protection generally lasts for the life of the creator and 50 years.

1449. The Federal Government in 1994 released an issues paper called "Stopping the rip-offs: intellectual property protection for Aboriginal and Torres Strait Islander peoples". The paper addresses options for reform to overcome the inadequate protection of indigenous arts and cultural expression. The options include special legislation to address concepts of ownership and duration of protection, and the development of an authentication mark to identify genuine indigenous products. These options are the subject of consultation with indigenous communities.

## States

### New South Wales

1450. The New South Wales National Parks and Wildlife Act 1974 provides that the Director-General of the National Parks and Wildlife Service shall be the authority for the protection of relics and Aboriginal places in New South Wales. Aboriginal places may be declared over any place which is or was of special significance with respect to Aboriginal culture. The Director-General is responsible for the proper care, preservation and protection of any relic or Aboriginal place on any lands reserved or dedicated under the National Parks and Wildlife Act (sect. 85). Care, control and management of Aboriginal areas are vested in the Director-General (sect. 63). Aboriginal areas may be dedicated over any unoccupied Crown lands for the purpose of preserving, protecting and preventing damage to relics or Aboriginal places within an Aboriginal area. There is a wide range of significant penalties for offences relating to the destruction of any relic or Aboriginal place. The National Parks and Wildlife (Karst Conservation) Amendment Act was enacted in 1991. This legislation provides extra protection for the preservation of limestone areas, underground riverways and caves, many of which are significant to Aboriginal and Torres Strait Islander culture. Provisions of the New South Wales Heritage Act 1977 also provide a means of protecting Aboriginal cultural heritage.

### Northern Territory

1451. The Aboriginal Sacred Sites Act 1978 was replaced in 1989 by the Northern Territory Aboriginal Sacred Sites Act 1989. The 1989 Act made a number of important changes to the scheme of the 1978 Act, including:

The Northern Territory Crown is bound by the Act, including provisions as to secrecy of material;

The Aboriginal Sacred Sites Authority established by the 1978 Act was replaced by the Aboriginal Areas Protection Authority (half of the Authority's members are to be women); and

Production of the Register of Sacred Sites or a certificate issued by the Authority or the Chief Executive Officer is prima facie evidence in all courts that an area of land referred to in the Register or the certificate is a sacred site.

1452. The 1989 Act provides for much higher penalties for:

Desecration of a site;

Unauthorized work on or use of a sacred site; and

Unauthorized entry to or remaining on a sacred site.

1453. The penalty for a body corporate convicted of an offence is double that applicable in the case of a natural person. A natural person may also be sentenced to imprisonment.

### Queensland

1454. The Cultural Record (Landscape Queensland and Queensland Estate) Act 1987 replaced the Aboriginal Relics Preservation Act 1976. Responsibility for administration of the 1987 Act was transferred from the Minister for Family Services and Aboriginal Affairs to the Minister for Environment and Heritage on 16 January 1989. The 1987 Act seeks to advance the preservation and management of all components of Landscape Queensland (areas altered or affected by humans and of significance for anthropological, cultural, prehistoric, historic or societal reasons) and the Queensland Estate (evidence of human occupation of prehistoric or historic significance). It aims to encourage the dissemination of knowledge of Landscape Queensland and the Queensland Estate and to promote an understanding of the historic continuum evidenced within Queensland.

1455. The Act creates a number of criminal offences in connection with the entry to or desecration of "designated areas", but this does not affect the access to and use of an area sanctioned by traditional custom. Attempts are being made to establish regional Aboriginal advisory committees to advise the Department of Environment and Heritage on relevant issues.

1456. The Department of Family Services and Aboriginal and Islander Affairs administers an Aboriginal and Torres Strait Islander arts and culture section. This section provides grants for projects which promote Queensland Aboriginal and Torres Strait Islander art and culture. Funding is also provided for projects which maintain, revitalize or preserve the cultural heritage of the Aboriginal and Torres Strait Islander community in Queensland. The Department also operates Queensland Aboriginal Creations, which provides a gallery for the sale and cultural appreciation of all forms of art created by Aboriginal and Torres Strait Islander artists.

### South Australia

1457. Protection of Aboriginal and Torres Strait Islander sites of significance is covered by the Aboriginal Heritage Act 1988. The Act also provides protection and preservation of Aboriginal and Torres Strait Islander heritage. The Minister must keep archives relating to Aboriginal and Torres Strait Islander heritage, including a register of Aboriginal and Torres Strait Islander sites and objects.

1458. A person who discovers an Aboriginal and Torres Strait Islander site of significance or an Aboriginal and Torres Strait Islander object or remains must report the discovery to the Minister. It is an offence to damage, disturb or interfere with a site, object or remains without the authority of the Minister. The Minister may restrict access to the area. The Act also controls the sale of and dealings with Aboriginal and Torres Strait Islander objects.

### Tasmania

1459. In Tasmania, the Aboriginal Relics Act 1975 provides protection for Aboriginal and Torres Strait Islander sites, artefacts and human remains. That Act is administered by the Director of the National Parks and Wildlife Service. The Act includes provisions enabling the Director to deal with artefacts and remains in a way which is approved by the Minister and an advisory council which includes representatives of the Aboriginal and Torres Strait Islander community.

### Victoria

1460. In Victoria, recent legislative amendments have already led to skeletal material being returned to the control of the museum, and total restriction of the sale of Aboriginal and Torres Strait Islander artefacts and cultural material. Victoria is also considering further measures for the protection of Aboriginal and Torres Strait Islander cultural heritage in the state.

1461. The Victorian Government holds the fundamental principle that Aboriginal people are entitled to the support of the law in their endeavours to restore and safeguard their cultural heritage, and seeks bipartisan support in the general community to preserve and protect Aboriginal cultural heritage. The Victorian Government recognizes the unique quality of Aboriginal history, culture and heritage and is determined that it should be better understood, preserved and protected.

1462. The Victorian Government primarily supports the Aboriginal cultural heritage activities outlined below.

> The Aboriginal Capital Grants Program provides grant funding to assist Aboriginal community organizations to, in some projects, preserve and promote their cultural heritage and regional identity. The Aboriginal Capital Grants Program has an allocation of $3.5 million for 1994-1995 and has provided funding for the establishment of Keeping Places and Cultural Centres in Victoria.
>
> The Aboriginal Cultural Heritage Program supports activities by Aboriginal community organisations to preserve and protect Victoria's Aboriginal cultural heritage. The Aboriginal Cultural Heritage Program has an allocation of $1.49 million for 1994/1995, and provides funding for the Cultural Officers Sub-Program and the Site Officers Sub-Program.
>
> > Unique to Victoria, the Cultural Officers Sub-Program provides funding for approximately 24 Aboriginal community organizations to employ an Aboriginal cultural Officer. Some of the duties carried out by cultural officers include the protection and management of Aboriginal sites, providing information on Aboriginal cultural heritage and representing the local Aboriginal community on all Aboriginal heritage matters.
> >
> > The Site Officers Sub-Program provides funding for four regional officers. Duties carried out by site officers include the monitoring of the condition and the management requirements of significant Aboriginal places and archaeological sites.
>
> The Cultural Sites Protection Program has been allocated $450,000 over a three-year period for the protection and management of Aboriginal places and sites of significance to Victoria's Aboriginal communities. Some of these projects have created employment opportunities for Aboriginal people.
>
> The Victorian Government has legislative responsibility under the Archaeological and Aboriginal Relics Protection Act 1972 for registering all significant archaeological sites in Victoria. There are approximately 17,000 sites registered today. The Archaeological and Aboriginal Relics Protection Act 1972 also requires that reports of archaeological surveys carried out in Victoria be provided to the Victorian Government. The Victorian Government administers Part 11A of

the Aboriginal and Torres Strait Islander Heritage Protection Act 1984 which provides, inter alia, statutory powers for Aboriginal communities to protect their cultural heritage.

The Victorian Government appointed 15 Aboriginal community cultural officers and trained them in the enforcement of and the powers and responsibilities under the Federal Aboriginal and Torres Strait Islander Heritage Protection Act 1984.

The Victorian Government applied for and received an annual gift from the Australian Research Council to fund a joint project with Latrobe University to study a large number of archaeological collections from Aboriginal sites in south-western Victoria.

Western Australia

1463. The Western Australian Aboriginal Affairs Department, Heritage and Culture Division supports a comprehensive and popular special library and information resource devoted to Aboriginal history, culture and contemporary issues.

1464. The Western Australian Department of Training has established and delivered several programmes aimed at promoting Aboriginal languages, including:

An accredited interpreter training course run by Karrayili; and

Aboriginal language fluency modules offered as a General Curriculum option in the full-time Certificates of General Education for Adults.

1465. The Western Australian Museum is meeting with Aboriginal communities and is offering its support to projects involving the display, recording and preservation of traditional and contemporary culture. Liaison is ongoing between the Department of the Arts, the Museum and other government agencies with a cultural portfolio to discuss ways of providing better services to the Aboriginal community and easier access to the various facilities offered by each agency through networking with each other.

Australian multicultural policies

1466. As shown in table 24, just over half of the Australian population has both parents born in Australia. Nearly one quarter of the population was born overseas. From 1991 estimates of ethnic groups based on first and second generation immigrants, people of British descent were the largest ethnic group from an English-speaking background, at about 8.5 per cent of the population. People of Italian descent were the largest ethnic group from a non-English speaking background, at just over 2.5 per cent of the population. People with origins in Viet Nam were the largest Asian group, at nearly 1 per cent of the population.

1467. A balance of rights and obligations underpins Australia's commitment to multiculturalism. The three key rights are:

> Cultural diversity - the right of all residents to express and share our individual cultural heritage, practise our religions and use our languages;
>
> Social justice - the right of all residents to receive equal treatment and opportunities, and the removal of any barriers which prevent this; and
>
> Economic efficiency - the need to maintain, develop and use effectively the skills and talents of all residents, regardless of ethnic origins, and to make best use of our multicultural resources.

1468. The Federal Government and some state governments have adopted access and equity policies aimed at ensuring that all residents of Australia enjoy access to the resources managed by the Government on behalf of the community.

1469. The object of the Federal Government's access and equity policy is to remove the barriers of race, language, religion, culture and gender in policy formulation, programme design and service delivery, for example, by providing access to the Translating and Interpreting Service, cross-cultural training for public servants and consultations with stakeholders.

1470. In the words of the 1995 report of the National Multicultural Advisory Council, there is clear evidence that the access and equity performance of most federal departments and agencies has improved since 1989, particularly those engaged in service delivery, for example, the Departments of Social Security; Employment, Education and Training; Immigration and Ethnic Affairs; and Human Services and Health. According to the "Access and equity: annual report 1994", prepared by the Office of Multicultural Affairs:

> "Agencies, with few exceptions, reported the provision of some level of service designed to overcome communication barriers for clients and potential clients who do not speak, understand or read English well. The most advanced agencies are actively recruiting staff with bilingual and bicultural skills and others are learning the value of the Telephone Interpreter Service. Most government departments now provide some translated materials and are making an effort to target non-English speaking background and indigenous communities in their information media. Government staff training programmes include modules on cross-cultural awareness to varying degrees and selection criteria for new staff require, at the very least, an understanding and awareness of access and equity principles. The practice of coordination, both with client groups and other government departments, is growing across agencies as they realize the importance and effectiveness of a cooperative approach in delivering services."

1471. At the same time, consultations with ethnic and indigenous communities reveal that deficiencies are still perceived to exist, including in a major service department. Agencies are often criticized for inadequate community liaison and information dissemination, delays in access to interpreters, staff insensitivity to cultural differences among clients and inadequate collection and use of ethnicity data in planning and evaluation.

1472. A National Integrated Settlement Strategy has been developed to improve coordination and quality of service delivery to immigrants across all spheres of government, in consultation with the community. Monitoring and evaluation arrangements are in place for the strategy.

Ethnic communities and the Department of Social Security

1473. Interpreter and translation services are provided by a pool of interpreters available to the Department of Social Security and supplemented by a pool of on-call and sessional interpreters and translators who work under contract. Where necessary, these services are supplemented by the telephone translating and interpreting service provided by the Department of Immigration and Ethnic Affairs. The employment of staff with language skills is also actively encouraged by the Department. These staff receive a Linguistic Performance Allowance.

1474. Documents that relate to client eligibility for assistance are translated free of charge by the Department of Social Security into languages other than English. All pamphlets, brochures and posters are considered for translation. The most important information products for each programme are translated into a wide range of languages. For products which are not translated, the Department has adopted a policy of printing a "language block" which advises readers that information on the particular programme or service is available through the Multilingual Telephone Information (MTI) Service.

1475. The MTI Service was set up to assist migrants seeking information and advice about social security in community languages. People who have a limited understanding of English can access the service from anywhere in Australia for the cost of a local call and speak to an operator in their own language. The calls are answered in about 50 different languages.

1476. Extensive use is made of the ethnic media to disseminate information to people from a non-English speaking background. All Departmental media releases are distributed to selected ethnic media outlets. Media releases of particular relevance to overseas born clients, for example those dealing with assurance of support or international agreement arrangements, are translated into community languages. The Department of Social Security's publication Age Pension News appears in 15 community languages as a supplement in various ethnic newspapers nationally. Paid advertising in ethnic newspapers and on SBS television and ethnic community radio stations is used extenively.

1477. The Department of Social Security also operates the Migrant Liaison Officer Program, the purpose of which is to disseminate information about the Department's programmes and services to ethnic communities. The feedback obtained from ethnic communities about the information needs of and the impact of initiatives on non-English speaking clients is essential to the planning and development of service delivery in the Department. Migrant liaison officers also play a key role in facilitating local-level liaison to increase ethnic community involvement in service delivery.

1478. Each state has a Migrant Advisory Committee which meets approximately four times a year. The committees provide a formal forum for the ethnic community to raise service delivery issues with the Department. Committee members represent a broad range of migrant communities and organizations. In most states, these committees are serviced jointly by the Department of Social Security and the Department of Employment, Education and Training, in recognition of the common client base of the two departments. Special community seminars are also arranged to explain changes in social security programmes. Examples of such exercises include those arranged as part of the international agreement programme and before the integration of family payments.

Languages

1479. Support is given in many jurisdictions to foster the use of ethnic community languages. English is the common language for social communication and members of the community not fluent in English are encouraged to learn English. Special programmes of assistance are available for both children of school age and adults. The Government provides all incoming migrants who do not possess basic English skills with a language entitlement. In addition, English language tuition is also provided through the Government's labour market programmes.

1480. It is recognized that there will always be groups in the community who will not be able to communicate in English or whose English will not be fluent enough to enable them to function without some assistance. These groups include new arrivals, the elderly and others. Interpreter services are therefore provided by most jurisdictions to assist migrants who have language difficulties in communicating their needs or in obtaining advice and access to services. A federally funded Translating and Interpreter Service and a number of state interpreting and translating services cover most urban and regional centres where people whose first language is not English live, as well as dealing with written documents for settlement. There are also active programmes of support for ethnic radio, multicultural television, ethnic newspapers, the use of universal signs and ethnic schools. In relation to interpreters, see also article 14, Information in other languages and commentary on paragraph 3 (f), above.

Education

1481. Detailed information on educational programmes for children of non-English speaking background is provided in Section G of Australia's first report under the Convention on the Rights of the Child.

Ethnic families

1482. Ethnic communities have informed the Federal Government that marital strain results from adjustment of the family after migration, changes in the rights and independence of women, overly optimistic pre-emigration expectations of life in Australia, cross-cultural conflict, intergenerational conflict, infidelity and domestic violence.

1483. In 1993 the Office of Multicultural Affairs of the Department of Prime Minister and Cabinet and the Attorney-General's Department commissioned a joint research project to study the utilization, cultural appropriateness and accessibility of federally funded marriage/relationship counselling services with respect to groups from non-English speaking backgrounds. The research project confirmed that federally funded marriage/relationship counselling services are seen as lacking in cultural awareness; however, specific resourcing would provide successful targeted service provision. Ethnic leaders have also recognized that it is not possible for the Federal Government to provide family relationship services specific to all ethnic groups and that increased access through community development officers (CDOs) will facilitate cross-cultural awareness and allow for appropriate service models to be developed.

1484. The Federal Government provided funds to appoint CDOs in recognition of the fact that services need to be more relevant and accessible. Funds have been provided to organizations to conduct CDO pilot projects for four years in New South Wales (2), Victoria (1), Queensland (1), South Australia (1) and Western Australia (1). The figures in brackets indicate the number of officers to be appointed in each state.

### Ethnic women

1485. In line with the 1993 Review of Government Policy Advice Mechanisms on the Status of Women, ministers and portfolios are now responsible for ensuring that their policies and programmes recognize the particular disadvantage of women from non-English speaking backgrounds. The Department of Immigration and Ethnic Affairs consults closely with relevant portfolios to maintain a cross-portfolio overview of federal activity affecting women from non-English speaking backgrounds. Responsibility for addressing the recommendations of the former Commonwealth State Council on Non-English Speaking Background Women's Issues (whose term ended in 1994) now rests with relevant portfolios.

1486. As part of its work in the area of advising on policy, the Office of the Status of Women liaises closely with the Women's Sub-Committee of the Settlement Advisory Council (Department of Immigration and Ethnic Affairs) and continues to encourage portfolios to recognize the needs and concerns of women from non-English speaking backgrounds in developing, implementing and evaluating their programmes. For example, the Office participated in the Steering Committee reviewing Commonwealth Employment Service operations under section 26 of the Sex Discrimination Act (which outlaws direct or indirect discrimination in services or programmes). The views of women from non-English speaking backgrounds were specifically sought in consultations carried out as part of the review. In addition, organizations which represent women from non-English speaking backgrounds are included in the twice-yearly round table meetings hosted by the Minister Assisting the Prime Minister for the Status of Women.

1487. As noted above in relation to article 3, the federal community education programme, Stop Violence Against Women, funded from 1992 to 1995, has identified Aboriginal and Torres Strait Islander women and women from non-English speaking backgrounds as target groups. Projects funded include:

A national workshop seeking solutions to stop violence against Filipino women;

An Italian media information and education project to provide a radio series on the issue of violence against women, follow-up print media articles and a phone-in offering the community advice and information;

Production of a series of anti-violence television programmes in eight languages, broadcast nationally;

A series of workshops, seminars and information sessions on stopping violence against non-English speaking women living in the West Pilbara (mining town) region;

Funding a support worker to develop culturally appropriate education for Muslim women seeking refuge from domestic violence.

1488. The publicity strand of the community education programme has included broadcasting radio commercials nationally in the following 10 languages: Arabic, Cantonese, Greek, Italian, Spanish, Mandarin, Vietnamese, Croatian, Serbian and Turkish. Additionally, ethnic print media have carried advertisements in Arabic, Chinese, Croatian, Greek, Italian, Macedonian, Portuguese, Serbian, Spanish, Turkish and Vietnamese.

### Ethnic media

1489. The Special Broadcasting Service television and radio services continue to build on the wide acceptance and prestige they have established as national broadcasters within the Australian community. In the community broadcasting sector, there are five licensed full-time ethnic language stations located in all capital cities, except Darwin and Canberra. Access to ethnic language groups is also provided by over 60 other community broadcasters. The ethnic press has expanded to a position where there are now over 120 newspapers and magazines, published in more than 30 languages, servicing people of non-English speaking background throughout Australia. The print media publications are independently funded.

### States

1490. State ethnic affairs offices work with the Office of Multicultural Affairs to further multiculturalism in Australia. States have implemented many important programmes in the field of multiculturalism. Details of some of these are given below.

### New South Wales

1491. The Ethnic Affairs Commission of New South Wales oversees the implementation of ethnic affairs policy across the range of New South Wales government activity. It also works to ensure the aspirations and concerns of ethnic communities are included in the formulation of government policy and the delivery of government services. In order to carry out this responsibility, the Commission provides policy and liaison services to the New South Wales Government and to the wider community. It also provides interpreting and translating services to the community through its Language Services Division and administers a grants programme. The policy basis underpinning the involvement of the New South Wales Government in ethnic affairs is the New South Wales Charter of Principles for a Culturally Diverse Society. The Charter recognizes New South Wales's cultural diversity as a valuable resource and determines that everyone should have the greatest opportunity to contribute and participate at all levels of public life. The Charter also outlines the responsibility that public agencies have to respond to a culturally diverse community. In recent years, the Ethnic Affairs Commission has conducted a range of projects, including:

> The Police and Ethnic Communities Inquiry, a wide-ranging formal inquiry into relations between the police and ethnic communities that resulted in the development of a number of recommendations which are currently being implemented;
>
> A Taskforce on Overseas Qualifications in the New South Wales Public Sector which examined the use of the extensive overseas skills and experience in the New South Wales public sector;
>
> Two Multicultural Local Government Forums which examined ways in which local government can respond effectively to the culturally diverse communities that it serves;
>
> Making of Multicultural Australia, a joint project with the University of Technology aimed at documenting the developments in cultural diversity in Australia during the 1970s and 1980s.

1492. The Commission also provides annual awards in a number of areas of the Arts, including awards for literary works and film, in order to stimulate the inclusion of multicultural themes in the Arts. Awards are also presented for innovation and excellence in multicultural marketing. Promoting harmony in the community is also important and, at the request of community groups, the Commission assists these groups to resolve their differences.

### Northern Territory

1493. In respect of services to ethnic groups, the Northern Territory Office of Ethnic Affairs has many programmes that provide assistance to ethnic minorities. The Northern Territory Interpreter and Translator Service deals with requests from government, non-government groups, ethnic groups and individual members of the community for interpreting and translating. An Overseas Qualification Unit is responsible for assisting ethnic people with the procedures for obtaining recognition of their qualifications.

## South Australia

1494. The South Australian Multicultural and Ethnic Affairs Commission Act 1980 reflects the South Australian Government's commitment to multiculturalism. According to section 4 of the Act, multiculturalism means policies and practices that recognize and respond to the ethnic diversity of the South Australian community and have as their primary objects the creation of conditions under which all groups and members of the community may:

> Live and work together harmoniously;
>
> Fully and effectively participate in, and employ their skills and talents for the benefit of, the economic, social and cultural life of the community; and
>
> Maintain and give expression to their distinctive cultural heritages.

1495. The Multicultural and Ethnic Affairs Commission Act 1980 places certain obligations on government agencies to formulate, develop and implement appropriate multicultural policies. Under subsection 12 (1) (b) of the Act, a major function of the South Australian Multicultural and Ethnic Affairs Commission is "to advise the Government and public authorities on, and assist them in, all matters relating to the advancement of multiculturalism and ethnic affairs". Under subsections 12 (2) (a) and (d) that function includes the responsibilities:

> To assist in the development of strategies designed to ensure that multicultural and language policies are incorporated as an integral part of wider social and economic development policies;
>
> To work with public authorities to ensure that there is a coordinated approach to the advancement of multiculturalism and ethnic affairs;
>
> To keep under review and advise the Government and public authorities on the extent to which services and facilities are available to meet the needs of minority ethnic groups; and
>
> To assist public authorities to devise effective methods for the evaluation and reporting of policies and programmes for the advancement of multiculturalism and ethnic affairs.

1496. The Office of Multicultural and Ethnic Affairs, the operational arm of the Commission, has two access and equity or social justice programmes which specifically protect the rights and property of people from ethnic minorities. These are, the Promotion of Multiculturalism programme and the Provision of Interpreting and Translating Services programme.

1497. The broad objectives of the Promotion of Multiculturalism programme are:

> To assist government and community agencies to respond equitably to the cultural and linguistic diversity of the community in terms of resource allocations, human resources management, management improvement and service provisions;

To promote the economic, social and cultural benefits of multiculturalism for all South Australians; and

To provide information, advice and referral to new settlers.

1498. One of the prime objectives of the multicultural policies of the South Australian Government is to move public sector agencies away from the perception of multicultural services as isolated activities or programmes which bear little relationship to the broader programmes of an agency and, where staff and resources used to run such activities are marginal elements of overall budgets, to ensure that such activities are integrated into the mainstream of an agency's activity.

## Tasmania

1499. The Tasmanian Government has a strong commitment to developing policies that are responsive to the needs and aspirations of the multicultural community. To this end it established the Tasmanian Advisory Council on Multicultural and Ethnic Affairs in 1992 to provide it with advice.

1500. The Council comprises 12 members who have been selected to provide a broad representation of the cultural diversity of Tasmania, having regard to their experience, gender, community and regional interests.

1501. The functions of the Council are to:

Provide advice to the Minister on the extent to which government services and programmes are available to and meet the needs of migrant settlers and ethnic community groups;

Identify multicultural and ethnic affairs issues and provide advice thereon;

Assist and provide cooperation between ethnic groups and organizations on matters of common interest;

Advise the Minister on particular multicultural and ethnic issues as referred to the Council by the Minister.

1502. The Tasmanian Government in 1994 adopted a set of Principles for Tasmania's Culturally Diverse Society:

To recognize and value the diversity of cultural and linguistic resources and the skills of all Tasmanians as social and economic assets, and to develop and use these resources and skills for the overall benefit of Tasmania;

To recognize and encourage the right of all Tasmanians to participate in, and to contribute to, the social, political, economic and cultural life of Tasmania;

> To accept and respect the culture, language and religion of all Tasmanians within the framework of the laws of the Commonwealth and the state;
>
> To recognize the rights of all Tasmanians to fair access to the services of the Tasmanian Government, taking into account the needs arising from the cultural and linguistic diversity of the community.

1503. The Tasmanian Government's Office of Multicultural and Ethnic Affairs, which is part of the Department of Premier and Cabinet provides guidance to government departments and public sector organizations in the application of these principles.

### Victoria

1504. The Victorian Ethnic Affairs Commission was established by an Act of Parliament as an advisory body to the Victorian Minister for Ethnic Affairs. The Commission's objectives include to encourage all of Victoria's ethnic groups to retain and express their social identity and cultural inheritance, and to promote full participation by Victoria's ethnic groups in the social, economic, cultural and political life of the Victorian community. The Commission provides grants to ethnic organizations to support these organizations' activities and projects.

1505. Funding is also provided to Victorian ethnic community organizations under the Home and Community Care Program, a joint Commonwealth-state programme which provides home and community support programmes for frail aged people, younger people with disabilities and their carers.

1506. Arts Victoria supports the cultural heritage of Victorians of diverse cultural, religious and language backgrounds through support to multicultural arts organizations, ethnic festivals and to organizations involved in the identification, preservation and display of collections.

### Western Australia

1507. In recognition of the diversity of the Western Australian population, the Department for Community Development has a Multicultural Welfare Policy. This policy is based on the social justice principles of equity, access and participation. The implementation of this policy emphasizes the Department's commitment to ensuring that its policies, programmes and services are appropriate, relevant and accessible to Western Australians from different cultural backgrounds.

1508. The implementation strategy for this policy has eight goals:

> To ensure that legislation and planning in the Department reflect the diversity of the Western Australian population it serves;
>
> To ensure that the Department's human resources policies reflect and enhance the implementation of the Multicultural Welfare Policy;

To train staff in the development of skills so that they can provide effective and appropriate services to Western Australians from different cultural backgrounds;

To develop office procedures that are appropriate and relevant to the population of Western Australia;

To inform ethnic communities effectively about the Department's programmes and services;

To improve the access of ethnic minorities to the Department's funding programmes;

To develop strategies for collecting ethnicity related data; and

To ensure consultation with ethnic minority groups in policy, programme and service planning and development.

1509. The Department has appointed a Senior Policy Officer, Ethnic Services to provide advice and consultative services on ethnic minority issues and to guide the implementation of the Multicultural Welfare Policy.

## List of tables

1. Federal government involvement in advancing the status of women

2. Commonwealth - Females in higher education by type of course and field of study 1983 and 1993

3. Total fertility rates, 1991

4. Age-specific death rates per 100,000 population by sex, Aboriginal and total Australian population, 1990-1992

5. Australian prisoners, June 1985 to 1994, imprisonment rate per 100,000 adult population

6. Percentage of prisoners by legal status as at June 1982 and 1993

7. Number of Aboriginal prisoners in custody, 1988-1994

8. Percentage indigenous prisoners of total prisoners, 1988-1994

9. Total prisoners per 100,000 adults by jurisdiction, June 1982 to 1993

10. Number of sentenced prisoners on hand by jurisdiction, June 1982 to 1993

11. Sentenced prisoners on hand, by jurisdiction, rate per 100,000 adult population, June 1982 to 1993

12. Number of sentenced prisoners received in each jurisdiction during June 1994

    Imprisonment rates (prisoners per 100,000 adult and total populations) based on daily average

13. Aboriginal and Torres Strait Islander over-representation ratios, by jurisdiction, 1988 to 1994

14. Remandees per 100,000 adults by jurisdiction, June 1982 to 1993

15. Number of remandees, by jurisdiction, June 1982 to 1993

16. Northern Territory - monthly daily averages for juvenile institutions, 1991

17. Source of funds for Legal Aid Commission, 1987 to 1993

18. Trade unions: number of unions according to size of union, Australia

19. Family - national summary

20. Births outside marriage with paternity acknowledged

21. Age-specific first marriage rates

22. Trends in the use of formal and informal child care

23. Voting patterns

Percentage by states, Northern Territory, Aboriginal and Torres Strait Islander Commission (ATSIC) regions and Torres Strait area, 1994

24. Birthplace/parents' birthplace of the Australian population, 1991

25. Population by country of birth, 1981, 1991 and 1994 ('000 persons)

26. Immigrants by major birthplace groups, and their Australian-born children, 1991

27. Law and justice

Percentages by states, Northern Territory and Aboriginal and Torres Strait Islander Commission (ATSIC) regions and Torres Strait area, 1994

28. Australian deaths in custody 1980 to 1995

Year of death, custodial authority and Aboriginality, deaths in institutional settings only

29. Australian deaths in custody 1990 to 1995

Year of death, custodial authority and Aboriginality, deaths in all custodial circumstances

30. Australian deaths in custody 1990 to 1995

Year of death, custodial authority and Aboriginality, deaths in non-institutional settings only

31. Progression through secondary school - the 1992 year 12 cohort

## Table 1

## Federal government involvement in advancing the status of women

| PRIME MINISTER | | | | | | | | | |
|---|---|---|---|---|---|---|---|---|---|
| Minister for Human Services and Health and Minister Assisting the Prime Minister for the Status of Women | | | | | | | | | Minister for Development Cooperation and Pacific Island Affairs |
| | Attorney-General | | | | | | | | |
| Department of the Prime Minister and Cabinet | Human Rights and Equal Opportunity Commission | Minister for Housing and Regional Development | Minister for Aboriginal and Torres Strait Islander Affairs | Minister for the Environment, Sport and Territories | Minister for Primary Industry and Energy | Minister for Social Security | Minister for Industrial Relations | Minister for Employment, Education and Training | Australian International Development Assistance Bureau |
| Office of the Status of Women | Sex Discrimination Commissioner | Department of Housing and Regional Development | Aboriginal and Torres Strait Islander Commission | Department of Environment, Sport and Territories | Department of Primary Industry and Energy | Department of Social Security | Department of Industrial Relations | Department of Employment, Education and Training | Women in Development Unit |
| Commonwealth/State Ministers' Conference on Status of Women Issues | | | | | Rural Women's Unit | | Equal Pay Unit | Women's Bureau | |
| Standing Committee of Commonwealth and State Women's Adviser | Aboriginal and Torres Strait Islander Social Justice Commissioner | | Office of Indigenous Women | Women in Sport Unit | | | Labour Relations Equity Section | Women's Employment, Education and Training Advisory Group | |
| Australian Council for Women | Race Discrimination Commissioner | | | | | | Work and Family Unit | National Policy for the Education of Girls in Australian Schools | |
| Round Table Consultations | | | | | | | | | |
| Department of Human Services and Health | Disability Discrimination Commissioner | | | | | | Affirmative Action Agency | | |
| | Australian Law Reform Commission | | | | | | | | |
| Women's Health Unit | | | | | | | | | |

Source: Office of the Status of Women.

Note: The Commonwealth-State Minister's Conference and the Standing Committee of Commonwealth-State Women's Advisers have been established to provide consultative forums for strategic discussion, exchange of information and coordination of Commonwealth and state activities pertaining to women.

## Table 2

## Commonwealth - Females in higher education by type of course and field of study 1983 and 1993

| Type of course/field of study | Female enrolments | | Females as proportion of total enrolments | |
|---|---|---|---|---|
| | 1983 (thousands) | 1993 (thousands) | 1983 (%) | 1993 (%) |
| Field of study | | | | |
| Agriculture/forestry | 1 710 | 3 884 | 27.9 | 35.3 |
| Architecture/building | 1 610 | 4 189 | 20.7 | 33.9 |
| Arts/humanities/social sciences | 54 890 | 86 476 | 63.7 | 67.7 |
| Business/administration/economics | 18 539 | 52 069 | 29.5 | 43.2 |
| Education | 48 945 | 55 643 | 65.9 | 72.7 |
| Engineering/surveying | 1 280 | 5 736 | 4.6 | 12.5 |
| Health/medicine | 10 496 | 52 741 | 53.5 | 74.5 |
| Dentistry | | | | |
| Law/legal studies | 4 168 | 9 332 | 40.1 | 47.8 |
| Science/applied science | 17 237 | 33 631 | 35.5 | 40.2 |
| Veterinary science | 639 | 961 | 43.6 | 55.9 |
| Non-award | 1 746 | 2 969 | 47.2 | 49.7 |
| Total | 161 260 | 307 631 | 46.3 | 53.4 |

*Source*: Department of Employment, Education and Training's Higher Education Division's Time Series.

## Table 3

## Total fertility rates, 1991

| State | Aboriginal population | Total population |
|---|---|---|
| | Number | Number |
| NSW | 3.0 | 1.9 |
| VIC | 3.0 | 1.8 |
| QLD | 3.2 | 1.9 |
| SA | 3.0 | 1.7 |
| WA | 3.6 | 1.9 |
| TAS | 2.6 | 1.9 |
| NT | 3.4 | 2.3 |
| ACT | 2.6 | 1.8 |
| Total | 3.1 | 1.9 |

Source: Birth Registrations; Census of Population and Housing; Dugbaza (1994).

## Table 4

### Age-specific death rates per 100,000 population by sex, Aboriginal and total Australian population, 1990 to 1992

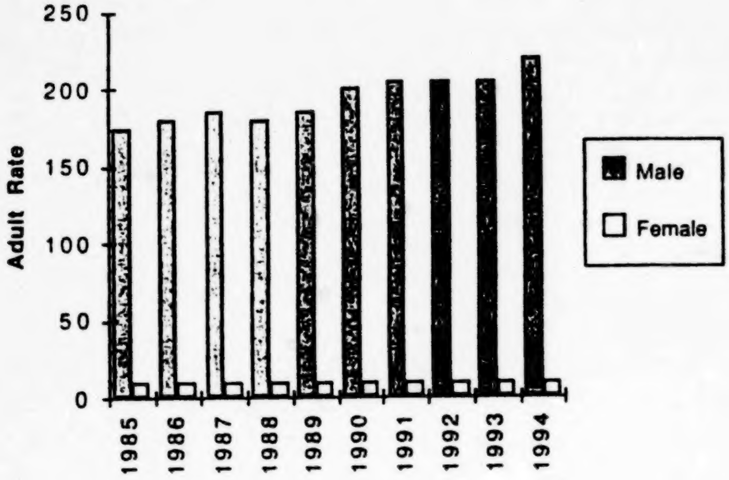
| | Aboriginal population* | | Total Australian population | |
|---|---|---|---|---|
| Age group (years) | Males | Females | Males | Females |
| 0 | 2 681 | 2 485 | 789 | 622 |
| 1-4 | 155 | 129 | 38 | 30 |
| 5-14 | 50 | 46 | 21 | 15 |
| 15-24 | 402 | 156 | 108 | 41 |
| 25-34 | 665 | 367 | 129 | 54 |
| 35-44 | 1 115 | 583 | 177 | 93 |
| 45-54 | 2 228 | 1 465 | 404 | 242 |
| 55-64 | 3 601 | 3 530 | 1 212 | 646 |
| 65-74 | 6 187 | 6 395 | 3 090 | 1 689 |
| 75+ | 13 843 | 10 424 | 12 386 | 9 285 |

Source: Australian Institute of Health and Welfare, derived from deaths registration data; Australian Institute of Health and Welfare. An overview of Aboriginal and Torres Strait Islander health; present status and future trends, Australian Government Publishing Service, Canberra, 1995.

* Figures for the Aboriginal population are based on data from Western Australia, South Australia and the Northern Territory.

## Table 5

## Australian prisoners, June 1985 to 1994, imprisonment rate per 100,000 adult population



Source: Australian Prison Trends No. 217, June 1994, Australian Institute of Criminology.

Table 6

Percentage of prisoners by legal status, as at June 1982 and 1993

| | NSW | | VIC | | QLD | | WA | | SA | | TAS | | NT | | ACT | | AUS | |
|---|---|---|---|---|---|---|---|---|---|---|---|---|---|---|---|---|---|---|
| | 1982 | 1993 | 1982 | 1993 | 1982 | 1993 | 1982 | 1993 | 1982 | 1993 | 1982 | 1993 | 1982 | 1993 | 1982 | 1993 | 1982 | 1993 |
| Under sentence | 83.40 | 80.50 | 86.70 | 85.10 | 90.70 | 84.30 | 88.40 | 87.80 | 87.30 | 78.70 | 88.90 | 85.30 | 91.90 | 91.90 | 0.00 | 0.00 | 86.50 | 82.70 |
| Convicted Awaiting appeal | 4.10 | 9.10 | 0.80 | 2.10 | 2.00 | 3.20 | 4.30 | 1.00 | 0.00 | 0.00 | 3.30 | 0.80 | 0.00 | 0.00 | 0.00 | 0.00 | 2.70 | 5.20 |
| Awaiting sentence | 2.30 | 0.40 | 0.60 | 0.00 | 0.00 | 0.00 | 1.20 | 0.70 | 3.80 | 0.00 | 0.80 | 0.00 | 0.00 | 0.00 | 0.00 | 0.00 | 1.40 | 0.30 |
| Unconvicted | 9.90 | 9.80 | 9.50 | 12.80 | 6.70 | 12.40 | 5.90 | 10.10 | 8.70 | 21.30 | 6.30 | 13.60 | 6.70 | 7.80 | 100.0 | 100.0 | 8.50 | 11.60 |
| Unfit to plead | - | 0.30 | - | 0.00 | - | 0.00 | - | 0.20 | - | 0.00 | - | 0.40 | - | 0.20 | - | 0.00 | - | 0.20 |
| Awaiting deportation | 0.08 | 0.00 | 0.20 | 0.00 | 0.40 | 0.10 | 0.07 | 0.10 | 0.00 | 0.00 | 0.00 | 0.00 | 1.30 | 0.00 | 0.00 | 0.00 | 0.17 | 0.10 |
| Other | 0.05 | - | 2.30 | - | 0.06 | - | 0.00 | - | 0.00 | - | 0.00 | - | 0.00 | - | 0.00 | - | 0.45 | - |

**Source**: 1982 and 1993 National Prison Censuses.

## Table 7

### Number of Aboriginal prisoners in custody 1988 to 1994

| | NSW | VIC | QLD | WA | SA | TAS | NT | ACT | AUS |
|---|---|---|---|---|---|---|---|---|---|
| 1988 | 385 | 65 | 431 | 528 | 114 | 10 | 276 | 0 | 1 809 |
| 1989 | 415 | 86 | 412 | 558 | 102 | 9 | 243 | 0 | 1 825 |
| 1990 | 579 | 88 | 367 | 585 | 124 | 12 | 286 | 0 | 2 041 |
| 1991 | 664 | 91 | 346 | 577 | 150 | 10 | 328 | 0 | 2 166 |
| 1992 | 648 | 106 | 370 | 574 | 187 | 13 | 322 | 3 | 2 223 |
| 1993 | 729 | 105 | 427 | 637 | 185 | 14 | 319 | 0 | 2 416 |
| 1994 | 788 | 141 | 544 | 681 | 219 | 17 | 342 | 1 | 2 733 |

Source: 1988-1993, National Prison Censuses; 1994, Australian Prison Trends, June 1994.

## Table 8

### Percentage indigenous prisoners of total prisoners 1988 to 1994

| | NSW | VIC | QLD | WA | SA | TAS | NT | ACT | AUS |
|---|---|---|---|---|---|---|---|---|---|
| 1988 | 8.2 | 3.1 | 18.2 | 32.0 | 13.5 | 3.4 | 72.4 | 0.0 | 14.7 |
| 1989 | 7.9 | 3.8 | 17.2 | 35.6 | 11.7 | 3.7 | 69.2 | 0.0 | 14.1 |
| 1990 | 9.1 | 3.8 | 16.0 | 34.0 | 13.3 | 5.1 | 68.9 | 0.0 | 14.3 |
| 1991 | 9.3 | 3.9 | 16.5 | 33.4 | 14.4 | 3.8 | 70.5 | 0.0 | 14.4 |
| 1992 | 8.7 | 4.7 | 18.3 | 30.3 | 16.2 | 4.8 | 72.0 | 15.8 | 14.3 |
| 1993 | 9.6 | 4.6 | 20.6 | 31.4 | 15.9 | 5.3 | 75.6 | 0.0 | 15.2 |
| 1994 | 12.4 | 5.6 | 22.3 | 28.6 | 16.6 | 6.9 | 73.1 | 0.9 | 17.2 |

Source: 1988-1993, National Prison Censuses; 1994, Australian Prison Trends, June 1994.

## Table 9

## Total prisoners per 100,000 adults, by jurisdiction, June 1982 to 1993

| | NSW | VIC | QLD | WA | SA | TAS | NT | ACT | AUS |
|---|---|---|---|---|---|---|---|---|---|
| 1982 | 96.3 | 60.8 | 95.4 | 142.3 | 83.1 | 77.6 | 369.3 | 3.2 | 89.8 |
| 1983 | 95.4 | 68.1 | 96.9 | 154.2 | 77.0 | 67.7 | 300.7 | 9.2 | 91.6 |
| 1984 | 84.7 | 62.0 | 104.4 | 155.0 | 56.0 | 76.9 | 266.3 | 10.0 | 85.6 |
| 1985 | 102.3 | 62.1 | 108.4 | 146.5 | 76.7 | 71.6 | 339.0 | 6.3 | 94.1 |
| 1986 | 103.3 | 63.5 | 115.0 | 152.3 | 78.1 | 79.7 | 412.4 | 9.3 | 97.6 |
| 1987 | 108.9 | 62.4 | 120.3 | 149.2 | 83.4 | 85.6 | 435.5 | 7.4 | 100.8 |
| 1988 | 110.1 | 65.0 | 118.3 | 147.0 | 79.4 | 90.0 | 352.7 | 7.2 | 100.4 |
| 1989 | 121.6 | 69.6 | 115.0 | 135.6 | 80.9 | 73.3 | 319.2 | 11.1 | 103.5 |
| 1990 | 145.2 | 70.3 | 107.4 | 145.2 | 85.4 | 69.7 | 369.9 | 11.8 | 112.2 |
| 1991 | 159.8 | 69.2 | 95.6 | 143.3 | 94.4 | 77.0 | 407.9 | 7.6 | 116.0 |
| 1992 | 166.3 | 67.5 | 89.5 | 154.4 | 103.3 | 77.4 | 386.9 | 8.8 | 118.3 |
| 1993 | 168.0 | 67.0 | 89.0 | 163.0 | 103.7 | 75.7 | 360.5 | 6.8 | 119.2 |

Source: 1982 to 1993 National Prison Censuses.

Note: Adult includes all persons 17 years of age and over to be comparable with other rates presented in this report.

## Table 10

### Number of sentenced prisoners on hand by jurisdiction, June 1982 to 1993

| | NSW | VIC | QLD | WA | SA | TAS | NT | AUS |
|---|---|---|---|---|---|---|---|---|
| 1982 | 3 261 | 1 577 | 1 522 | 1 253 | 710 | 220 | 287 | 8 830 |
| 1983 | 3 212 | 1 826 | 1 548 | 1 399 | 645 | 181 | 229 | 9 040 |
| 1984 | 2 873 | 1 665 | 1 702 | 1 429 | 454 | 210 | 205 | 8 538 |
| 1985 | 3 483 | 1 654 | 1 796 | 1 361 | 589 | 207 | 274 | 9 364 |
| 1986 | 3 611 | 1 749 | 1 962 | 1 459 | 620 | 227 | 356 | 9 984 |
| 1987 | 3 883 | 1 705 | 2 171 | 1 439 | 665 | 238 | 416 | 10 517 |
| 1988 | 3 948 | 1 811 | 2 155 | 1 459 | 643 | 264 | 331 | 10 611 |
| 1989 | 4 524 | 1 956 | 2 183 | 1 396 | 684 | 219 | 307 | 11 269 |
| 1990 | 5 517 | 1 954 | 2 094 | 1 539 | 714 | 204 | 349 | 12 371 |
| 1991 | 6 260 | 1 925 | 1 884 | 1 563 | 759 | 232 | 413 | 13 036 |
| 1992 | 6 732 | 1 913 | 1 849 | 1 700 | 862 | 236 | 413 | 13 705 |
| 1993 | 6 852 | 1 982 | 1 809 | 1 807 | 915 | 229 | 389 | 13 983 |

Source: 1982 to 1993 National Prison Censuses.

## Table 11

### Sentenced prisoner on hand, by jurisdiction, rate per 100,000 adult population, June 1982 to 1993

| | NSW | VIC | QLD | WA | SA | TAS | NT | AUS |
|---|---|---|---|---|---|---|---|---|
| 1982 | 84.4 | 54.7 | 88.6 | 132.1 | 72.7 | 72.1 | 339.7 | 80.7 |
| 1983 | 82.1 | 62.3 | 87.8 | 143.5 | 65.0 | 58.6 | 257.9 | 81.2 |
| 1984 | 72.5 | 55.9 | 94.5 | 143.5 | 45.1 | 67.0 | 219.2 | 75.4 |
| 1985 | 86.6 | 54.7 | 97.4 | 133.4 | 57.7 | 65.0 | 278.1 | 81.3 |
| 1986 | 88.2 | 56.8 | 103.3 | 137.8 | 59.8 | 70.1 | 342.2 | 84.8 |
| 1987 | 92.9 | 54.4 | 111.4 | 132.0 | 63.4 | 72.7 | 387.9 | 87.5 |
| 1988 | 92.7 | 56.8 | 107.4 | 130.0 | 60.5 | 80.0 | 306.4 | 86.5 |
| 1989 | 104.6 | 60.3 | 105.0 | 120.7 | 63.5 | 65.5 | 279.2 | 90.0 |
| 1990 | 125.9 | 59.3 | 97.9 | 129.9 | 65.5 | 60.0 | 311.0 | 97.0 |
| 1991 | 140.8 | 57.6 | 86.0 | 129.7 | 68.8 | 67.4 | 362.3 | 100.6 |
| 1992 | 149.5 | 56.7 | 82.0 | 138.7 | 77.3 | 67.9 | 357.5 | 104.2 |
| 1993 | 150.9 | 58.4 | 77.8 | 145.2 | 81.6 | 65.4 | 332.3 | 105.0 |

Source: 1982 to 1993 National Prison Censuses.

## Table 12

### Number of sentenced prisoners received in each jurisdiction during June 1994

### Imprisonment rates (prisoners per 100,000 adult and total populations) based on daily average

| | Sentenced prisoners received | | Daily average | General population b/ (in thousands) | | Imprisonment rates | |
|---|---|---|---|---|---|---|---|
| | Total | FD only a/ | (as above) | Adult | Total | Adult | Total |
| NSW | 481 | 7 | 6 438 | 4 594 | 6 058 | 140.1 | 106.3 |
| VIC | 150 | 11 | 2 481 | 3 412 | 4 475 | 72.7 | 55.4 |
| QLD | 408 | 53 | 2 459 | 2 393 | 3 195 | 102.8 | 77.0 |
| WA | 433 | 228 | 2 065 | 1 265 | 1 698 | 163.3 | 121.6 |
| SA | 388 | 176 | 1 316 | 1 129 | 1 467 | 116.6 | 89.7 |
| TAS | 60 | 27 | 250 | 353 | 474 | 70.8 | 52.7 |
| NT | 72 | 30 | 459 | 117 | 169 | 392.8 | 271.1 |
| ACT | 0 | 0 | 107 | 228 | 304 | 47.2 | 35.3 |
| AUS | 1 992 | 532 | 15 576 | 13 490 | 17 840 | 115.5 | 87.3 |

Source: Australian Prison Trends No. 217 June 1994, Australian Institute of Criminology.

a/ Number of fine defaulters only.

b/ Projected population end of June 1995 derived from Estimated Resident Population by Sex and Age: States and Territories of Australia June 1987 to Preliminary June 1992 (ABS Catalogue No. 3201.0). "Adult" refers to all persons 17 years of age and over.

## Table 13

### Aboriginal and Torres Strait Islander over-representation ratios, by jurisdiction, 1988 to 1994

| Year | NSW | VIC | QLD | WA | SA | TAS | NT | ACT | AUS |
|---|---|---|---|---|---|---|---|---|---|
| 1988 | 11.4 | 12.8 | 12.4 | 23.8 | 19.5 | 3.1 | 11.4 | 0.0 | 16.0 |
| 1989 | 10.1 | 15.0 | 12.4 | 28.3 | 16.4 | 3.3 | 9.5 | 0.0 | 14.9 |
| 1990 | 12.1 | 14.3 | 11.3 | 26.5 | 18.8 | 4.4 | 9.2 | 0.0 | 15.2 |
| 1991 | 12.3 | 14.2 | 11.8 | 25.8 | 20.3 | 3.0 | 9.8 | 0.0 | 15.2 |
| 1992 | 10.6 | 16.3 | 12.4 | 22.3 | 22.8 | 3.5 | 10.3 | 37.8 a/ | 14.2 |
| 1993 | 10.9 | 16.5 | 13.7 | 23.6 | 22.4 | 0.8 | 11.7 | 0.0 | 14.6 |
| 1994 | 17.1 | 18.9 | 16.3 | 25.9 | 25.7 | 7.9 | 13.0 | 0.0 | 19.4 |

Source: 1988-1992 National Prison Censuses: Australian Prison Trends, June 1993 and March 1994, Australian Institute of Criminology. New South Wales figure adjusted to include periodic detainee numbers. Aboriginal and Torres Strait Islander population base figures interpolated between 1986 and 1991 Census figures and simple extrapolation used to project 1992, 1993 and 1994 estimates. Total population base figures from the Australian Bureau of Statistics.

a/ Not significant - based on very small numbers of prisoners.

### Table 14

### Remandees per 100,000 adults, by jurisdiction, June 1982 to 1993

| | NSW | VIC | QLD | WA | SA | TAS | NT | ACT | AUS |
|---|---|---|---|---|---|---|---|---|---|
| 1982 | 11.9 | 6.1 | 6.8 | 10.2 | 10.4 | 5.6 | 29.6 | 3.2 | 9.1 |
| 1983 | 13.3 | 5.8 | 9.1 | 10.7 | 11.9 | 9.1 | 42.8 | 9.2 | 10.4 |
| 1984 | 12.1 | 6.0 | 7.8 | 11.4 | 10.9 | 9.9 | 47.1 | 10.0 | 9.9 |
| 1985 | 15.7 | 7.4 | 9.1 | 13.1 | 19.0 | 6.6 | 60.9 | 6.3 | 12.5 |
| 1986 | 15.1 | 6.7 | 9.6 | 14.5 | 18.3 | 9.3 | 70.2 | 9.3 | 12.5 |
| 1987 | 16.0 | 8.0 | 7.7 | 17.2 | 20.0 | 12.8 | 47.6 | 7.4 | 13.1 |
| 1988 | 17.4 | 8.2 | 9.1 | 13.8 | 18.9 | 9.7 | 46.3 | 7.2 | 13.3 |
| 1989 | 17.0 | 9.3 | 9.5 | 13.9 | 17.4 | 7.8 | 40.0 | 11.1 | 13.4 |
| 1990 | 19.4 | 11.0 | 9.4 | 15.3 | 19.9 | 9.7 | 58.8 | 11.8 | 15.2 |
| 1991 | 19.0 | 11.5 | 9.1 | 13.5 | 25.6 | 9.6 | 44.7 | 7.6 | 15.2 |
| 1992 | 16.7 | 10.8 | 7.5 | 15.7 | 26.0 | 9.5 | 29.4 | 8.8 | 14.1 |
| 1993 | 17.2 | 8.6 | 11.1 | 17.8 | 22.1 | 10.3 | 28.2 | 6.8 | 14.1 |

Source: 1982 to 1993 National Prison Censuses.

## Table 15

### Number of remandees, by jurisdiction, June 1982 to 1993

| | NSW | VIC | QLD | WA | SA | TAS | NT | ACT | AUS |
|---|---|---|---|---|---|---|---|---|---|
| 1982 | 458 | 176 | 116 | 97 | 102 | 17 | 25 | 5 | 996 |
| 1983 | 521 | 170 | 161 | 104 | 118 | 28 | 38 | 15 | 1 155 |
| 1984 | 481 | 180 | 140 | 114 | 110 | 31 | 44 | 17 | 1 117 |
| 1985 | 632 | 225 | 168 | 134 | 194 | 21 | 60 | 11 | 1 445 |
| 1986 | 619 | 206 | 183 | 153 | 190 | 30 | 73 | 17 | 1 471 |
| 1987 | 668 | 251 | 150 | 188 | 210 | 42 | 51 | 14 | 1 574 |
| 1988 | 743 | 260 | 183 | 155 | 201 | 32 | 50 | 14 | 1 638 |
| 1989 | 737 | 300 | 198 | 161 | 187 | 26 | 44 | 22 | 1 675 |
| 1990 | 849 | 362 | 202 | 181 | 217 | 33 | 66 | 24 | 1 934 |
| 1991 | 843 | 385 | 200 | 163 | 283 | 33 | 51 | 16 | 1 974 |
| 1992 | 753 | 364 | 168 | 193 | 290 | 33 | 34 | 19 | 1 854 |
| 1993 | 780 | 290 | 259 | 222 | 248 | 36 | 33 | 15 | 1 883 |

Source: 1982 to 1993 National Prison Censuses.

## Table 16

### Northern Territory - monthly daily averages for juvenile institutions, 1991

| Detention Centre | Malak House | Giles House | Wilderness Work Camp | Total |
|---|---|---|---|---|
| January | 17.87 | 3.32 | 16.77 | 37.96 |
| February | 17.86 | 1.21 | 16.96 | 36.03 |
| March | 17.39 | 2.58 | 13.06 | 33.03 |
| April | 20.90 | 7.23 | 14.63 | 42.76 |
| May | 18.74 | 7.61 | 17.06 | 43.41 |
| June | 16.53 | 3.17 | 15.90 | 35.60 |
| July | 12.68 | 2.58 | 15.81 | 31.07 |
| August | 14.07 | 2.48 | 11.77 | 28.32 |
| September | 15.13 | 1.67 | 10.63 | 27.43 |
| October | 16.10 | 0.58 | 10.80 | 27.48 |
| November | 15.17 | 1.03 | 8.83 | 25.03 |
| December | 17.52 | Close | 10.13 | 27.65 |
| MDA for year | 16.66 | 2.79 | 13.53 | 32.98 |
| Previous year | 12.07 | 7.94 | 9.83 | 29.84 |

*Source*: Northern Territory Government 1991.

## Table 17

## Source of funds for legal aid commissions, 1987 to 1993

| Type of income | Financial year (figures are in $ millions) | | | | | |
|---|---|---|---|---|---|---|
| | 1987-88 | 1988-89 | 1989-90 | 1990-91 | 1991-92 | 1992-93 |
| Commonwealth grants | 85.2 | 92.8 | 100.6 | 105.3 | 114.9 | 117.7 |
| State grants | 18.5 | 27.0 | 25.2 | 31.1 | 41.2 | 57.8 |
| Special trust and statutory interest | 28.9 | 39.0 | 42.5 | 43.6 | 45.6 | 29.5 |
| Client contributions and recovered costs | 18.5 | 24.5 | 27.1 | 29.1 | 39.5 | 40.3 |
| Interest on investments | 4.6 | 6.6 | 10.1 | 7.6 | 4.7 | 4.1 |
| Other revenue | 0.4 | 0.5 | 2.5 | 2.2 | 1.6 | 2.4 |
| Total revenue | 156.1 | 190.3 | 208.0 | 218.9 | 247.6 | 251.9 |

Source: Access to Justice. An Action Plan, p. 233, Access to Justice Advisory Committee, 1994.

Note: Includes Australian Legal Aid Office Tasmania up to 31 December 1990. Due to rounding, totals may not exactly add.

## Table 18

Trade Unions: Number of Unions according to size of union, Australia

| | Number of Unions | | | | 30 June 1994 | | |
|---|---|---|---|---|---|---|---|
| Size of union (number of members) | 30 June 1990 | 30 June 1991 | 30 June 1992 | 30 June 1993 | Number of unions | Per cent of total unions | Cumulative per cent of total unions |
| Under 100 | 40 | 35 | 32 | 29 | 26 | 16.6 | 16.6 |
| 100 and under 250 | 34 | 34 | 26 | 20 | 21 | 13.4 | 29.9 |
| 250 and under 500 | 18 | 17 | 18 | 14 | 10 | 6.4 | 36.3 |
| 500 and under 1,000 | 44 | 38 | 28 | 26 | 19 | 12.1 | 48.4 |
| 1,000 and under 2,000 | 34 | 31 | 21 | 18 | 15 | 9.6 | 58.0 |
| 2,000 and under 3,000 | 18 | 13 | 14 | 11 | 11 | 7.0 | 65.0 |
| 3,000 and under 5,000 | 23 | 24 | 16 | 15 | 7 | 4.5 | 69.4 |
| 5,000 and under 10,000 | 21 | 18 | 19 | 14 | 11 | 7.0 | 76.4 |
| 10,000 and under 20,000 | 18 | 21 | 15 | 8 | 9 | 5.7 | 82.2 |
| 20,000 and under 30,000 | 11 | 11 | 7 | 5 | 4 | 2.5 | 84.7 |
| 30,000 and under 40,000 | 11 | 8 | 6 | 3 | 4 | 2.5 | 87.3 |
| 40,000 and under 50,000 | 5 | 6 | 5 | 4 | 3 | 1.9 | 89.2 |
| 50,000 and under 80,000 | 6 | 5 | 5 | 8 | 4 | 2.5 | 91.7 |
| 80,000 and under 100,000 | 5 | 7 | 7 | 4 | - | - | 91.7 |
| 100,000 and over | 7 | 7 | 8 | 9 | 13 | 8.3 | 100.0 |
| Total | 295 | 275 | 227 | 188 | 157 | 100.0 | |

**Source**: Trade Union Statistics, Australia, 30 June 1994, Catalogue No. 6323.0 Australian Bureau of Statistics.

## Table 19

## Family - national summary

| Living arrangements | Units | 1983 | 1984 | 1985 | 1986 | 1987 | 1988 | 1989 | 1990 | 1991 | 1992 | 1993 |
|---|---|---|---|---|---|---|---|---|---|---|---|---|
| Total families | '000 | 3 947 | 3 983 | 4 033 | 4 087 | 4 146 | 4 236 | 4 319 | 4 456 | 4 502 | 4 587 | 4 638 |
| Persons who live alone (of persons aged 15 years and over) | % | 7.6 | 7.9 | 8.2 | 8.2 | 8.3 | 8.5 | 8.4 | 8.2 | 8.6 | 8.9 | 10.2 |
| Average family size (persons) | no. | n.a. | n.a. | 3.3 | 3.3 | 3.3 | 3.2 | 3.2 | 3.2 | 3.2 | 3.2 | 3.2 |
| Couple families with dependants (of all families) | % | 47.6 | 47.2 | 46.7 | 45.8 | 45.5 | 45.7 | 44.7 | 44.3 | 43.7 | 43.4 | 42.9 |
| One parent families with dependants (of all families) | % | 7.5 | 7.9 | 7.8 | 7.8 | 8.4 | 8.1 | 7.6 | 8.1 | 8.5 | 9.0 | 9.0 |
| Couple only families (of all families) | % | 29.4 | 28.9 | 29.6 | 30.2 | 30.4 | 30.7 | 31.5 | 31.2 | 31.3 | 31.1 | 32.1 |
| De facto couples (of all couples) | % | n.a. | n.a. | n.a. | 5.7 | n.a. | n.a. | n.a. | n.a. | 8.2 | n.a. | n.a. |
| Couples with dependants, both employed (of all couples with dependants) | % | 40.3 | 42.4 | 45.5 | 48.5 | 50.2 | 50.9 | 53.8 | 55.9 | 53.4 | 53.3 | 52.5 |

Source: Australian Bureau of Statistics, Australian Social Trends 1995.

Reference periods: Data on de facto couples are at census date. Data on other living arrangements are at 30 June from 1986; prior to that the reference date was 30 July.

## Table 20

## Births outside marriage with paternity acknowledged

| Age group of mother (years) | 1976<br>% | 1993<br>% |
|---|---|---|
| 19 and under | 33.6 | 74.5 |
| 20-24 | 48.2 | 81.5 |
| 25-29 | 61.6 | 84.3 |
| 30-34 | 63.3 | 85.6 |
| 35-39 | 63.2 | 84.6 |
| 40 and over | 54.4 | 76.6 |
| Total | 46.9 | 81.7 |

Source: Australian Bureau of Statistics, Australian Social Trends 1995.

## Table 21

## Age-specific first marriage rates

| Age group (years) | Men | | | | Women | | | |
|---|---|---|---|---|---|---|---|---|
| | 1966 rate | 1976 rate | 1986 rate | 1993 rate | 1966 rate | 1976 rate | 1986 rate | 1993 rate |
| 19 and under | 14.9 | 9.9 | 2.4 | 1.4 | 61.5 | 49.0 | 15.2 | 7.4 |
| 20-24 | 152.8 | 122.6 | 63.4 | 40.5 | 272.0 | 187.5 | 112.0 | 73.7 |
| 25-29 | 195.7 | 135.9 | 105.0 | 90.4 | 183.9 | 138.8 | 120.2 | 105.9 |
| 30-34 | 100.3 | 81.8 | 77.6 | 72.3 | 90.8 | 86.5 | 74.0 | 69.8 |
| 35-39 | 48.6 | 45.9 | 42.7 | 42.0 | 45.0 | 49.8 | 39.8 | 35.6 |
| 40-44 | 27.9 | 25.5 | 22.2 | 21.9 | 24.9 | 26.3 | 22.9 | 17.8 |
| 45-49 | 15.7 | 15.7 | 13.4 | 12.1 | 15.9 | 15.5 | 12.8 | 9.8 |
| 50 and over | 5.8 | 6.4 | 4.6 | 4.0 | 3.6 | 3.9 | 2.1 | 2.3 |

Source: Australian Bureau of Statistics, Australian Social Trends 1995.

Marriage rate - the number of marriages per 1,000 not married male or female population age 15 years or older.

## Table 22

### Trends in the use of formal and informal child care

| Type of care used | 1984<br>% | 1987<br>% | 1990<br>% | 1993<br>% |
|---|---|---|---|---|
| Formal care only | 8.7 | 9.1 | 9.3 | 11.0 |
| Informal care only | 26.1 | 31.7 | 33.9 | 29.4 |
| Formal and informal care | 3.7 | 6.6 | 8.4 | 8.3 |
| Total formal and/or informal care | 38.5 | 47.5 | 51.6 | 48.8 |
| Neither formal nor informal care | 61.5 | 52.6 | 48.4 | 51.2 |
| Total | 100.0 | 100.0 | 100.0 | 100.0 |
| Total children (1 000) | 2 897.4 | 2 887.9 | 3 003.7 | 3 085.9 |

Source: Australian Social Trends 1994. Catalogue No. 4102.0 Australian Bureau of Statistics.

## Table 23

### Voting patterns

### Percentage by states, Northern Territory, Aboriginal and Torres Strait Islander Commission (ATSIC) regions and Torres Strait area, 1994

| | Persons aged 18 years and over | | | |
|---|---|---|---|---|
| | Total ('000) | Voted in federal election | Voted in ATSIC election | Total ('000) |
| AUSTRALIA | 197.5 | 66.2 | 39.4 | 163.8 |
| New South Wales | 52.0 | 64.2 | 25.0 | 43.0 |
| Victoria | 12.6 | 67.2 | 29.9 | 10.6 |
| Queensland | 52.1 | 70.1 | 43.3 | 43.1 |
| South Australia | 11.9 | 57.7 | 30.3 | 10.1 |
| Western Australia | 30.2 | 60.6 | 48.2 | 25.0 |
| Tasmania | 6.6 | 87.1 | 20.0 | 5.4 |
| Northern Territory | 30.9 | 66.9 | 59.8 | 25.5 |

Source: 1994 National Aboriginal and Torres Strait Islander Survey.

## Table 24

## Birthplace/parents' birthplace of the Australian population, 1991

| Parents' birthplace | Percentage of Australian population |
|---|---|
| Both parents born in Australia | 54.3 |
| Indigenous | 1.6 |
| One parent overseas-born | 11.0 |
| Both parents overseas-born | 8.1 |
| Parents' birthplace not stated | 0.5 |
| Overseas born | 22.3 |
| Birthplace not stated | 2.2 |

Source: Multicultural Australia. The Next Steps. Towards and Beyond 2000. Volume 2. A Report of the National Multicultural Advisory Council. Australian Government Publishing Service, Canberra, 1995.

## Table 25

### Population by country of birth, 1981, 1991 and 1994 ('000 persons)

| Country of birth | 1981 | 1991 | 1994 | % change 1981-1994 |
|---|---|---|---|---|
| AUSTRALIA | 11 812.3 | 13 318.8 | 13 779.7 | 16.7 |
| OVERSEAS: | | | | |
| Oceania | | | | |
| Fiji | 9.5 | 34.3 | 36.3 | 282.1 |
| New Zealand | 175.7 | 286.4 | 285.5 | 62.5 |
| Other | 28.5 | 50.3 | 51.1 | 79.3 |
| Total | 213.7 | 371.0 | 372.9 | 74.5 |
| Europe and the former USSR | | | | |
| Cyprus | 24.7 | 22.4 | 21.8 | -11.7 |
| Germany | 115.2 | 120.4 | 118.8 | 3.1 |
| Greece | 153.2 | 147.4 | 145.2 | -5.2 |
| Hungary | 29.3 | 27.5 | 26.2 | -10.6 |
| Italy | 285.3 | 272.0 | 263.9 | -7.5 |
| Malta | 59.9 | 54.6 | 52.8 | -11.9 |
| Netherlands | 100.5 | 100.9 | 98.2 | -2.3 |
| Poland | 62.1 | 69.5 | 67.7 | 9.0 |
| UK and Ireland | 1 175.7 | 1 244.3 | 1 216.1 | 3.4 |
| Former USSR and Baltic States | 53.3 | 44.6 | 46.9 | -12.0 |
| Former Yugoslav Republics | 156.1 | 168.0 | 174.8 | 12.0 |
| Other | 131.0 | 143.8 | 145.0 | 10.7 |
| Total | 2 346.3 | 2 415.3 | 2 377.3 | 1.3 |
| Middle East and North Africa | | | | |
| Egypt | 32.3 | 37.8 | 38.5 | 19.2 |
| Lebanon | 52.7 | 78.5 | 80.9 | 53.5 |
| Turkey | 25.7 | 31.7 | 32.5 | 26.5 |
| Other | 6.6 | 47.6 | 56.2 | 751.5 |
| Total | 117.3 | 195.7 | 208.1 | 77.4 |

| Country of birth | 1981 | 1991 | 1994 | % change 1981-1994 |
|---|---|---|---|---|
| Southeast Asia | | | | |
| Indonesia | 16.4 | 35.4 | 39.0 | 137.8 |
| Malaysia | 32.5 | 79.9 | 88.0 | 170.8 |
| Philippines | 15.8 | 79.1 | 88.4 | 459.5 |
| Singapore | 12.4 | 26.0 | 32.7 | 163.7 |
| Viet Nam | 43.4 | 124.8 | 142.0 | 227.2 |
| Other | 37.1 | 53.8 | 56.6 | 52.6 |
| Total | 157.7 | 398.9 | 446.8 | 183.3 |
| North East Asia | | | | |
| China | 26.8 | 84.6 | 91.4 | 241.0 |
| Hong Kong and Macau | 16.3 | 62.4 | 85.8 | 426.4 |
| Other | 13.7 | 55.6 | 66.2 | 383.2 |
| Total | 56.8 | 202.6 | 243.4 | 328.5 |
| Southern Asia | | | | |
| India | 43.7 | 66.2 | 74.9 | 71.4 |
| Sri Lanka | 17.9 | 40.4 | 44.8 | 150.3 |
| Other | 0.0 | 12.2 | 16.3 | * |
| Total | 61.6 | 118.8 | 136.0 | 120.8 |
| Northern America | | | | |
| Canada | 17.3 | 25.6 | 27.1 | 56.6 |
| USA | 30.6 | 49.5 | 55.5 | 81.4 |
| Other | 0.0 | 0.4 | 0.5 | * |
| Total | 47.9 | 75.5 | 83.0 | 73.3 |
| South America, Central America and the Caribbean | | | | |
| Chile | 14.6 | 27.5 | 27.4 | 87.7 |
| Other | 33.1 | 53.7 | 56.3 | 70.1 |
| Total | 47.7 | 81.2 | 83.8 | 75.7 |

| Country of birth | 1981 | 1991 | 1994 | % change 1981-1994 |
|---|---|---|---|---|
| Other Africa (excluding North Africa) | | | | |
| South Africa | 28.0 | 55.8 | 58.6 | 109.3 |
| Other | 34.0 | 50.4 | 53.8 | 58.2 |
| Total | 62.0 | 106.3 | 112.4 | 81.3 |
| Total Overseas | 3 110.9 | 3 965.3 | 4 063.6 | 30.6 |
| Total | 14 923.3 | 17 284.0 | 17 843.3 | 19.6 |

Source: Multicultural Australia, The Next Steps. Towards and Beyond 2000. Volume 2. A Report of the National Multicultural Advisory Council; Australian Government Publishing Service, Canberra, 1995.

Note: Australia did not begin to recognize the constituent countries of the Former Republic of Yugoslavia until January 1992.

* Not calculated due to small population base.

## Table 26

## Immigrants by major birthplace groups, and their Australian-born children, 1991

| Country of birth | Immigrant numbers | Children born in Australia | Total | % Australian population |
|---|---|---|---|---|
| United Kingdom | 1 122 412 | 314 334 | 1 436 746 | 8.5 |
| Italy | 254 780 | 198 072 | 452 852 | 2.7 |
| New Zealand | 276 073 | 21 107 | 297 180 | 1.8 |
| Greece | 136 327 | 106 124 | 242 451 | 1.4 |
| Former Yugoslav Republic | 161 076 | 72 653 | 233 729 | 1.4 |
| Viet Nam | 122 325 | 20 372 | 142 697 | 0.9 |
| Germany | 114 915 | 23 471 | 138 386 | 0.8 |
| Netherlands | 95 818 | 39 122 | 134 940 | 0.8 |
| Lebanon | 69 014 | 51 243 | 120 251 | 0.7 |
| Malta | 53 838 | 37 508 | 91 346 | 0.5 |
| Poland | 68 931 | 20 854 | 89 785 | 0.5 |
| China | 78 835 | 10 240 | 89 075 | 0.5 |
| Philippines | 73 673 | 5 669 | 79 342 | 0.5 |
| Malaysia | 72 566 | 5 916 | 78 482 | 0.5 |
| India | 61 602 | 9 873 | 71 475 | 0.4 |
| Ireland | 52 448 | 14 947 | 67 395 | 0.4 |
| Hong Kong | 58 955 | 4 108 | 63 063 | 0.4 |

Source: Multicultural Australia. The Next Steps. Towards and Beyond 2000. Volume 2. A Report of the National Multicultural Advisory Council. Australian Government Publishing Service, Canberra, 1995.

Note: Australia did not begin to recognize the constituent countries of the Former Republic of Yugoslavia until January 1992.

## Table 27

## Law and justice

## Percentage by states, Northern Territory, Aboriginal and Torres Strait Islander Commission (ATSIC) regions and Torres Strait area, 1994

| | Persons aged 13 years and over | | | |
|---|---|---|---|---|
| | Physically attacked or verbally threatened | Needed legal services in last 12 months | Arrested in last 5 years | Believe that people get on better with police now than 5 years ago |
| AUSTRALIA | 12.9 | 16.9 | 20.4 | 21.5 |
| New South Wales | 14.6 | 17.2 | 22.5 | 19.6 |
| Victoria | 25.2 | 25.3 | 22.6 | 21.1 |
| Queensland | 8.8 | 14.2 | 14.9 | 18.7 |
| South Australia | 15.4 | 22.1 | 28.5 | 24.1 |
| Western Australia | 13.5 | 17.3 | 25.4 | 20.6 |
| Tasmania | 13.4 | 17.4 | 12.6 | 15.4 |
| Northern Territory | 10.2 | 14.7 | 19.6 | 30.6 |

Source: 1994 National Aboriginal and Torres Strait Islander Survey.

## Table 28

## Australian deaths in custody 1980 to 1995

### Year of death, custodial authority and Aboriginality, deaths in institutional settings only*

| Year | Police | | | Prison | | | Juvenile detention | | | Total | | Grand Total |
|---|---|---|---|---|---|---|---|---|---|---|---|---|
| | Ab'l | Non-Ab'l | Total | Ab'l | Non-Ab'l | Total | Ab'l | Non-Ab'l | Total | Ab'l | Non-Ab'l | |
| 1980 | 5 | 7 | 12 | 5 | 25 | 30 | 1 | - | 1 | 11 | 32 | 43 |
| 1981 | 3 | 12 | 15 | 1 | 27 | 28 | 1 | - | 1 | 5 | 39 | 44 |
| 1982 | 4 | 15 | 19 | 4 | 21 | 25 | - | - | - | 8 | 36 | 44 |
| 1983 | 6 | 10 | 16 | 5 | 26 | 31 | - | 1 | 1 | 11 | 37 | 48 |
| 1984 | 3 | 12 | 15 | 4 | 27 | 31 | - | - | - | 7 | 39 | 46 |
| 1985 | 6 | 16 | 22 | 4 | 22 | 26 | - | - | - | 10 | 38 | 48 |
| 1986 | 8 | 13 | 21 | 1 | 16 | 17 | - | 1 | 1 | 9 | 30 | 39 |
| 1987 | 15 | 26 | 41 | 5 | 48 | 53 | - | 1 | 1 | 20 | 75 | 95 |
| 1988 | 7 | 14 | 21 | 6 | 36 | 42 | 1 | - | 1 | 14 | 50 | 64 |
| 1989 | 10 | 11 | 21 | 3 | 37 | 40 | - | 1 | 1 | 13 | 49 | 62 |
| 1990 | 1 | 17 | 18 | 6 | 27 | 33 | - | 1 | 1 | 7 | 45 | 52 |
| 1991 | 3 | 12 | 15 | 8 | 31 | 39 | - | - | - | 11 | 43 | 54 |
| 1992 | 4 | 9 | 13 | 2 | 32 | 34 | - | - | - | 6 | 41 | 47 |
| 1993 | 2 | 7 | 9 | 6 | 43 | 49 | - | 1 | 1 | 8 | 51 | 59 |
| 1994 | 1 | 6 | 7 | 10 | 43 | 53 | - | 1 | 1 | 11 | 50 | 61 |
| 1995** | - | 5 | 5 | 15 | 39 | 54 | - | 1 | 1 | 15 | 45 | 60 |

Source: Australian Institute of Criminology.

* Deaths in prisons, police lockups or juvenile detention facilities, during transfer to or from or in medical facilities following transfer from detention.

** Preliminary data.

## Table 29

## Australian deaths in custody 1990 to 1995

### Year of death, custodial authority and Aboriginality, deaths in all custodial circumstances*

| Year | Police | | | Prison | | | Juvenile detention | | | Total | | Grand Total |
|---|---|---|---|---|---|---|---|---|---|---|---|---|
| | Ab'l | Non-Ab'l | Total | Ab'l | Non-Ab'l | Total | Ab'l | Non-Ab'l | Total | Ab'l | Non-Ab'l | |
| 1990 | 5 | 26 | 31 | 6 | 27 | 33 | 1 | 1 | 2 | 12 | 54 | 66 |
| 1991 | 5 | 23 | 28 | 8 | 31 | 39 | - | - | - | 13 | 54 | 67 |
| 1992 | 6 | 24 | 30 | 2 | 34 | 36 | - | - | - | 8 | 58 | 66 |
| 1993 | 3 | 24 | 27 | 6 | 43 | 49 | - | 1 | 1 | 9 | 68 | 77 |
| 1994 | 3 | 23 | 26 | 10 | 43 | 53 | - | 1 | 1 | 13 | 67 | 80 |
| 1995** | 4 | 19 | 23 | 15 | 39 | 54 | - | 2 | 2 | 19 | 60 | 79 |

*Source*: Australian Institute of Criminology.

* Deaths in both institutional settings (e.g. prisons and police lockups) and in community settings (e.g. police pursuits, police shootings, sieges).

** Preliminary data.

## Table 30

## Australian deaths in custody 1990 to 1995

### Year of death, custodial authority and Aboriginality, deaths in non-institutional settings only*

| | Police | | | Prison | | | Juvenile detention | | | Total | | |
|---|---|---|---|---|---|---|---|---|---|---|---|---|
| Year | Ab'l | Non-Ab'l | Total | Ab'l | Non-Ab'l | Total | Ab'l | Non-Ab'l | Total | Ab'l | Non-Ab'l | Grand Total |
| 1990 | 4 | 9 | 13 | - | - | - | 1 | - | 1 | 5 | 9 | 14 |
| 1991 | 2 | 11 | 13 | - | - | - | - | - | - | 2 | 11 | 13 |
| 1992 | 2 | 15 | 17 | - | 2 | 2 | - | - | - | 2 | 17 | 19 |
| 1993 | 1 | 17 | 18 | - | - | - | - | - | - | 1 | 17 | 18 |
| 1994 | 2 | 17 | 19 | - | - | - | - | - | - | 2 | 17 | 19 |
| 1995** | 4 | 14 | 18 | - | - | - | - | 1 | 1 | 4 | 15 | 19 |

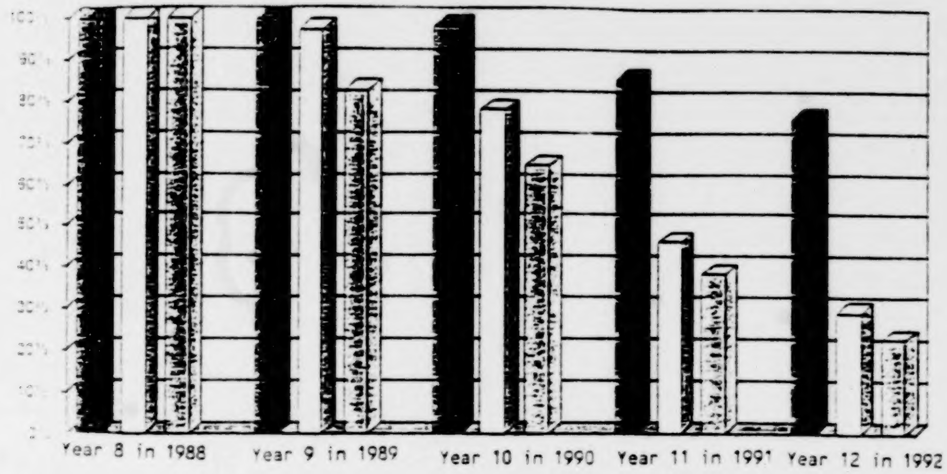
Source: Australian Institute of Criminology.

* Deaths other than those in police lockups, prisons, juvenile detention centres, or during transfer to or from such institutions and in hospitals following transfer from such facilities (e.g. in a community setting while police or prison authorities were attempting to detain a person).

** Preliminary.

## Table 31

Progression through secondary school - in 1992 year 12 cohort*



| | Year 8 | Year 9 | Year 10 | Year 11 | Year 12 |
|---|---|---|---|---|---|
| ■ Other Australian students | 100.0% | 100.0% | 98.3% | 85.8% | 76.2% |
| ☐ Aboriginal and Torres Strait Islander females | 100.0% | 97.1% | 78.1% | 46.2% | 29.0% |
| ▨ Aboriginal and Torres Strait Islander males | 100.0% | 82.7% | 64.7% | 38.2% | 22.5% |

Source: National Schools Statistics Collections, 1992.

* Data on students in Queensland schools are excluded.

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